SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 184. LEWIS PIERCE ET ALS., Trustees,
Plaintiffs in Error,
vs.
SOMERSET RAILWAY COMPANY.

No. 185. LEWIS PIERCE ET ALS., Trustees,
Plaintiffs in Error,
vs.
JOHN AYER ET ALS.

BRIEF FOR PLAINTIFFS IN ERROR.

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of Counsel.

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BRIEF OF THE PLAINTIFFS IN ERROR.

Statement of the Cases.

The two cases involve the same questions, and, by leave of the Court are argued as one cause.

No. 185, although last on the docket, is first in time, and is a suit at law brought by the plaintiffs in error as trustees and mortgagees to recover possession of the railroad property and appurtenances of the Somerset Railroad Company, conveyed to the plaintiffs by mortgage deed of said Railroad Company on July 1, 1871, duly recorded on August 31, 1871, in the proper registry. Mortgage given to secure an issue of $450,000 of bonds payable in twenty years with semi-annual interest.

Suit brought against John Ayer and als. as disseizors of the plaintiffs in error, and in actual possession of the property.

No. 184 is a suit in equity brought by an alleged new corporation calling itself the "Somerset Railway," asking to have the suit at law enjoined, and that the plaintiffs in error be required to release and convey their title under the mortgage to the alleged new corporation. This new corporation claimed title to the mortgaged property by force of certain acts of the legislature of Maine passed twelve years after the execution of the mortgage, and eight years before the bonds secured by it became due. Without any foreclosure of the mortgage, the "Somerset Railway" claimed that by force of these legislative acts, and the proceedings under them, a new corporation had been formed, although in a manner wholly unauthorized by the laws existing when the mortgage was executed; and that the title of the plaintiffs in error as trustees and mortgagees for the bondholders, and the rights of the bondholders themselves,

had been stripped from them without their consent, and had been transferred to, and vested in, the new corporation. And all this without sale, or purchase, or conveyance, or foreclosure of the mortgage, and in entire disregard of the provisions, special stipulations and agreements contained in the mortgage contract.

The Supreme Court of Maine after having in 1892, 85 Me. Rep. 79, decided against all these claims of the new corporation, in a later decision sustained them, and by final decree enjoined the plaintiffs in error from maintaining their suit at law for the recovery of the property, and required them to release and convey their title under the mortgage to the new corporation the "Somerset Railway."

The plaintiffs in error contended before the Supreme Court of Maine in both of the above suits, that these acts of the legislature of Maine subsequent to the execution of the mortgage, and the proceedings under them, if construed and sustained as the new corporation claimed, impaired, and, indeed, destroyed the obligations of the mortgage contract; and they have therefore brought these cases here for review by this Court.

The learned counsel for the defendants in error have filed motions to dismiss because they say no Federal question appears in the record. After more than seven years of conflict between these parties over Federal questions, and nothing else; with success and defeat attending each party, such a motion strikes any participant in that conflict as extraordinary. Neither party can state the case truthfully without stating a Federal question, and several of them.

In delivering the opinion of this court in *Keith* v. *Clark*, 97 *U. S.* 455, where a similar motion was made. *Mr. Justice Miller* said: "As the same facts are involved in the question of jurisdiction and the issue on the merits, it may be as well to state them."

This remark well applies to the present cases.

The bill in equity of the defendants in error sets out the mortgage of July 1 1871, with its special stipulations and agreements as between the mortgagors, the trustees, and the bondholders, and the mode in which alone a breach of the conditions of the mortgage could be declared, and the only way in which the foundation for a legal foreclosure could be laid under the laws then existing, by virtue of which a new corporation might be formed. It then alleges the formation of a new corporation under an act of the legislature of Maine *passed twelve years afterwards, in* 1883, in a manner wholly arbitrary, and entirely inconsistent with the original mortgage contract, and without pursuing any of the steps required by it; and it then claims that the title created in these trustees under the mortgage of July 1, 1871, and the rights of the bondholders secured by it, had all been transferred by force of this subsequent statute. and the proceedings under it, to the new corporation, the "Somerset Railway," and asks the Court to compel a conveyance by the trustees of their legal rights to such new corporation.

This bill raises on its face the question whether the obligation of

the mortgage contract is not only impaired, and changed, but destroyed by this subsequent statute and the proceedings under it.

A demurrer to this bill would have raised every Federal question. But it will be noticed that the first decision of the Court sustaining the validity of the mortgage of July 1, 1871, and directing the appointment of the plaintiffs in error as trustees to enforce its provisions, was made on Aug. 13, 1892; (*Anson and als.*, 85 *Me. Rep.* 79;) and the suit at law was brought by the plaintiffs in error for that purpose on the third day of December following, being the next term of the Court after their appointment; (Record in No. 185, Pages 7 and 9.) The bill in equity of the defendants in error was brought on Feb. 14, 1893, within six months after the decisions of the Court against them upon the same mortgage and statute and proceedings. (85 Me. Rep. 79, and Record of No. 184, Page 17.) The plaintiffs in error, then defendants in said equity suit, concluded that an answer to the bill would bring the litigation to an end sooner than a demurrer.

And thereupon an answer was filed in which the same Federal questions were raised that were relied upon in the former suit, said trustees having no suspicion or belief that the Court could reverse its former decision.

So that the bill in equity of the defendants in error. here the answer of the trustees, the plaintiffs in error here, and the record of the evidence, showing the mortgage of July 1, 1871, with its conditions, special stipulations and agreements, and the subsequent statute of 1883, and the effect given to that statute and the proceedings under it by the second decision of the Maine Supreme Court, not only impairing the mortgage contract, but destroying the title created by it and the rights secured under it without any foreclosure of the mortgage,—all raise Federal questions at once apparent upon reading them.

When the whole record bristles with Federal questions, it cannot be necessary for the party relying upon the protection of the Federal Constitution to continually refer in terms to that constitution, or to the particular clause relied upon.

In *Bridge Proprietors* v. *Hoboken Co.*, 1 *Wall.* 140, this Court said: "The suit in the State Court was a bill in chancery brought "by the present plaintiffs in error against the defendants. The "case was heard on bill and answer alone, and the decree was "simply a dismissal of the bill. We must look therefore to the "pleadings to determine the question of jurisdiction. * * *

"It is objected, however, by the defendants, that the pleadings "do not, in words say that the statute is void because it conflicts "with the Constitution of the United States, and do not point out "the special clause of the Constitution supposed to render the act "invalid. It would be a new rule of pleading, and one altogether "superfluous, to require a party to set out specially the provision of "the Constitution of the United States on which he relies for the "action of the court in the protection of his rights. If the courts

"of this country, and especially this court, can be supposed to take "judicial notice of anything without pleading it specially, it is the "Constitution of the United States.

"And if the plaintiff and defendant in their pleadings, make a "case which necessarily comes within some of the provisions of that "instrument, this court can surely recognize the fact without "requiring the pleader to say in words: "This paragraph of the "Constitution is the one involved in this case.'"

In *Murray* v. *Charleston*, 96 *U. S.* 441, the Court said: "In "questions relating to our jurisdiction, undue importance is often "attributed to the inquiry whether the pleadings in the state Court "expressly assert a right under the Federal constitution. The "true test is not whether the record exhibits an express statement "that a Federal question was presented, but whether such a ques- "tion was decided, and decided adversely to the Federal right. "Everywhere in our decisions it has been held we may review the "judgments of a State court when the determination or judgment "of that court could not have been given without deciding upon a "right or authority claimed to exist under the Constitution, laws, "or treaties of the United States, and deciding against that right. "Very little importance has been attached to the inquiry whether "the Federal question was formally raised. The jurisdiction of "this court over the judgments of the highest courts of the States "is not to to be avoided by the mere absence of express reference "to some provisions of the Federal Constitution. Wherever rights "acknowledged and protected by that instrument are denied or "invaded under the shield of state legislation, this Court is author- "ized to interfere. The form and mode in which the Federal "question is raised in the State Court is of minor importance, if, in "fact, it was raised and decided. Not a word is said (in the Act "of Congress of 1867,) respecting the mode in which it shall be "made to appear that such a question was presented for decision. "In the present case it was necessarily involved without any formal "reference to any clause in the Constitution, and it is difficult to "see how any such reference could have been made to appear "expressly."

In the *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 *U. S.*, 232, the court reafirm the principles laid down in *Bridge Prop.* v. *Hoboken Co.*, 1 *Wall.*, 116, 143, *supra*, and say that "The "true and rational rule is that the Court must be able to see clearly "from the whole record that the provision of the Constitution, or "Act of Congress, was relied on by the party who brings the writ "of error, and that the right thus claimed by him was denied." "That such was the necessary effect in law of the judgment."

In *New Orleans* v. *N. O. Water Works Co.*, 142 *U. S.*, 88, *Mr. J. Brown* in delivering the opinion of the court said: "We think that "before we can be asked to determine whether a statute has im- "paired the obligation of a contract, it should appear that there

"was a legal contract subject to impairment, and some ground to "believe that it has been impaired."

"There must be at least color of ground for the averment of a "Federal question in a case brought here by writ of error to the "highest court of a state in order to give this court jurisdiction."
Hamblin v. *Western Land Co.*, 147 *U. S.*, 531.

The cases cited in the motion of the learned counsel to dismiss, do not in the slightest degree conflict with the principles established in *Bridge Prop.* v. *Hoboken Co.*, 1 *Wall.*, 142, 143, *supra.* In neither of the four cases cited in their motion to dismiss was a question of contract, or of its impairment by state legislation, raised. And in neither did the facts set out in the pleadings of the parties, or the evidence appearing in the record, disclose any question arising under any other branch of the Constitution of the United States. And the court therefore held that where the facts, *per se*, and the pleadings of the parties, presented, necessarily, no Federal question in the State court, there was not enough in the record to give this court jurisdiction. That in such case, if the party intended in fact to rely upon some provision in the Constitution of the United States as in some way applicable to his case, but not apparent in the pleadings or record, he should make known his intention and claim in the State court, so that that court should understand they were to pass upon a Federal question.

But these cases present no conflict with the numerous decisions of the court holding that where the pleadings, or the evidence, present *per se*, Federal questions in the State court which must necessarily have been decided by that court against the party claiming such protection as the Federal Constitution might give, that this court always has jurisdiction to review such judgments of the State courts. And it is believed that no case can be found in the history of this court from the commencement of the government to the present time, of which the court declined to take jurisdiction when the pleadings, or the evidence, in the state court, presented *per se* a Federal question.

Such a question may arise upon a demurrer to a declaration at law, or upon a demurrer to a plea in bar—the declaration or plea being grounded upon some state law raising *per se* a Federal question.

Of course the courts of a state are bound to take judicial notice of all of its public laws. This court also takes notice of all the public laws of the several states. *Furman* v. *Nichol*, 8 *Wall.*, 57.

In this case, just cited, the plaintiffs in error held certain bank notes of the Bank of the State of Tennessee. The charter of the brnk enacted in 1838 provided that such bank notes should be received in payment for taxes. The plaintiffs in error tendered these notes to the clerk of the county in payments for taxes due.

The clerk refused to take them upon the ground that they had depreciated in value. Thereupon the plaintiffs in error applied to

the state court for a mandamus to compel him to receive them. The petition for the mandamus alleged that "the said charter "was a contract made with the people of the state, and every per- "son into whose possession the said notes and issues of said bank "might come that the same should be received by all collectors of "taxes, and in payment of all dues to the state of Tennessee, and it "is not in the power of the legislature of the said state of Tennes- "see to impair or annul the validity or binding force of said con- "tract."

The defendant, the county clerk, demurred to the petition. The State Circuit Court overruled the demurrer and awarded the mandamus. But the Supreme Court of the state reversed the decree of the court below without any assignment of reasons, and entered judgment in the following words: "The court being of opinion "that there is error in the judgment of the court below in overrul- "ing the demurrer in this case, doth order and adjudge that the "said judgment be reversed and the demurrer sustained, and the "petition dismissed."

This opinion was based upon an act of the legislature of Tennessee passed in June, A. D. 1865, repealing in express terms that section of the charter of the bank which made the notes of the bank receivable in payment of taxes; and another statute of the state passed February 16, 1866, prohibiting, in effect, receiving such notes in payment of taxes. (Page 46.) Upon this record the case was brought to this court. A motion was made to dismiss for want of jurisdiction. It was insisted by counsel in support of the motion that: "It is nowhere averred in the petition that the state had "passed a law impairing the obligation of a contract. Nor can this "be inferred by any necessary intendment from the record. The "court below does not assign any reasons why it sustained the "demurrer. * * The matter involved the construction of a Ten- "nessee statute by a Tennessee court, (whether there was any con- "tract as contended for by the plaintiffs in error,) not the validity "of any statute; and the matter is not revisable here." (Page 51.) Precisely the objection made in the present suits.

In reply to this motion and argument, *Mr. Benj. R. Curtis*, who has probably never had any superior in this country as a profound lawyer and jurist, thoroughly acquainted with every branch of Federal law and the practice of the courts, said: "If any one will "observe the character of the petition and of the demurrer, it will be "as obvious without argument as with it, that the question raised "and decided was by necessary intendment, none other than the "constitutionality of the act of repeal, as against the plaintiffs, in "violation of the contract with the state to receive the notes for "taxes, and the decision in favor of its validity." (Page 49.)

Mr. Justice Davis delivered the opinion of the court. "It is "urged," he said, "that the particular provision of the Constitution "which the plaintiffs in error say has been violated in its applica- "tion to their case, should be contained in the pleading, but this is

"in no case necessary. * * It is sufficient to confer jurisdiction "that the question was in the case, was decided adversely to the "plaintiffs in error, and that the court was induced by it to make "the judgment which it did." * (Page 56.)

"The purpose of the petition," he continues, "the issue which it "presented and sought to have determined, were as plainly to be "seen, as if the words of the particular constitutional provision "relied on had been inserted in it, and the obnoxious legislation "spread out at length. All courts take notice, without pleading, "of the Constitution of the United States, and the public laws of "the state where they are exercising their functions."

In *Turnpike Co.* v. *Illinois*, 96, *U. S.*, 64, a proceeding by information in the nature of a *quo warranto* brought by the State of Illinois against the St. Clair County Turnpike Co., charging it with unlawfully maintaining a toll-gate and collecting tolls upon a street in East St. Louis called Dyke avenue. The defendants justified under their charter, or act of incorporation, and several supplements.

The state replied that the legislature, by an act passed March 26, 1869, (subsequent to the date of the charter,) had granted to the city of East St. Louis exclusive power and control over said street called Dyke avenue, and imposed upon it the right and duty of grading and improving the street, and of removing obstructions from it, which would of course include the toll-gate. To this replication the defendants demurred, and insisted that the last mentioned statute impaired the obligation of the contract in its charter. The county court overruled the demurrer upon the ground that the charter of the company was limited in duration to 25 years and had expired. Upon appeal to the Supreme Court of the state, the judgment was affirmed. Upon this record the Turnpike Co. brought the case to this court by writ of error. It will be noticed that there was no allegation that the statute was unconstitutional, and no reference in any way to the Constitution of the United States except the statement that the "act of the legislature impaired the obligation of the contract made with itself in and by its said charter "and the supplements thereto." This record was held sufficient to sustain the writ of error, *Mr. Justice Bradley*, who delivered the opinion of the court, saying: "The question before us is, whether "any contract was set up by the defendant company, now plaintiff "in error, in its justification, which has been impaired by the subsequent legislation of the state."

This is the precise question in the cases at bar. The bill in equity of the defendants in error, the Somerset Railway, sets out *in extenso* the mortgage of July 1, 1871, with its conditions, special stipulations and agreements. It admits that the title to the railroad property became vested in the trustees under and by force of that mortgage. It then alleges the formation of a new corporation under an act of the legislature of Maine passed twelve years afterwards, the mode of such formation being entirely inconsistent with

the stipulations and agreements of the mortgage contract, and of the laws existing at the time the mortgage was executed, and, as the plaintiffs in error most respectfully contend, not only impairing but destroying the obligation of the mortgage contract. The mortgage provided the manner of foreclosing it. Without any such foreclosure, or any foreclosure, the alleged new company claimed that by force of the subsequent statute and the proceedings under it in the formation of the new corporation, the title of the plaintiffs in error, the trustees, had been divested, and transferred by act of law, to said new corporation. These allegations are all found in the bill in equity, and were sustained by the final judgment of the Supreme Court of Maine.

In the answer of the plaintiffs in error, the defendants in the equity suit below, they deny the legal existence of the alleged new corporation, becaused not authorized by the law existing when the mortgage was executed, and because inconsistent with the stipulations and agreements of the mortgage contract, and destructive of them and of the rights secured by them.

They deny that these contract rights could, by force of any subsequent legislation, be taken away from them, or become vested in the alleged new corporation. "They deny that said mortgage of "July 1, 1871 has, or could become *functus officio* except by payment " of the bonds which it was given to secure; and of these the com- " plainant admits that $110.600 are still standing and unpaid. And " for the payment of these bonds said trustees aver that the mortgage " of July 1, 1871 is a valid security, and that they have brought " writs of entry to recover said property for that purpose; and they " deny that any statute of this state has been enacted, or could be " enacted which will or can deprive said bondholders and trustees " of the rights secured to them by virtue of their contract of July " 1, 1871, and the laws of said state in force when said contract was " made. (Record, Page 31.)

In answer to paragraph 14 of the bill in equity the trustees further say: "That the mortgage of July 1, 1871 was a first mortgage " upon all of said property, and that the security afforded to them " and vested in them under and by force of said mortgage contract, " could not be taken away, nor in the least degree impaired by any " subsequent legislation until said bonds and coupons were paid, " or the statute of limitations had attached to them." (Record, Pages 33 and 34.)

" In answer to paragraph 15 these trustees say that they deny " the legal existence of the alleged "Somerset Railway." They "allege that the contract rights of all the parties to the mortgage of "July 1, 1871, were fixed by the laws in force when said mortgage " was executed. That no law of the State of Maine then existing " authorized the organization of a new corporation in the manner " here attempted. That the laws then existing formed a part of " the mortgage contract, and provided a mode by which said mort-

"gage could be legally foreclosed, and a new corporation formed "for the benefit of all the bondholders.

"But no law then existed, and these trustees are advised and "believe that no such law exists now, or ever existed in Maine, "authorizing a *part* of the bondholders of any railroad company to "form a new company that shall supersede and set aside the security "furnished by the original mortgage to those bondholders who take "no part in the formation of such new company.

"They believe and aver that the rights of those bondholders who "take no part in the formation of such company, are fixed by the "mortgage contract and can be affected in no way except by pay- "ment; that at most such new company occupy the situation and "have the rights of the original corporation, and must pay up all "outstanding bonds of other bondholders. They further aver that "the attempted foreclosure of the mortgage of July 1, 1871, by bill "in equity, [under the subsequent statute] and the alleged for- "mation of the "Somerset Railway," were equally void as against "these trustees and the unpaid bondholders; and that the parties "and persons now usurping the control of the Somerset Railroad "Company and its property are, as to them and the interests they "represent, simply trespassers and disseizors. That even if said "alleged foreclosure by bill in equity had been valid, its effect would "have been to vest an *absolute title in the trustees under said mort-* "*gage*, who would still continue to hold it for the benefit of the bond- "holders exactly as before; and that no part of said title could vest in "said 'Somerset Railway' even if legally formed." (Report Pages 34, 35.)

"These trustees in answer to paragraph 10 of said bill deny that "the mortgage of July 1, 1871 was ever legally foreclosed. They "aver that neither the original board of said trustees nor those "respondents, their lawful and only successors, have ever taken "any steps toward a legal foreclosure, or ever determined that there "had been a breach of the conditions of said mortgage. That "*by the express provisions of said mortgage* the *trustees alone* "had, and *have* the power to determine in the first instance whether "a breach of the conditions had taken place, and that such power is "vested in no other person or tribunal; and that this power has "never been exercised by either themselves or their predecessors.

"They admit that Reuben B. Dunn and John Ayer instituted "proceedings in said court without first obtaining an adjudication "by said trustees that there had been a breach of the conditions of "said mortgage; without which, as these respondents are advised "and believe, there could be no legal foreclosure of said mortgage, "not even by the trustees themselves. And these respondents fur- "ther aver that said Dunn and Ayer gave said trustees no notice "of their suit in equity to foreclose said mortgage and did not "make them parties to it; that said trustees were indispensable "parties to any suit to foreclose the same, and that without their "being made such parties any decree of foreclosure of said mortgage

"would be a nullity and of no force against said trustees. And said "trustees further aver that all the proceedings of said Dunn and "Ayer in attempting to procure a decree of foreclosure of the mort- "gage of July 1, 1871, were an attempt to shorten the time of "redemption secured to the mortgagors, the Somerset Railway "Company, by the mortgage contract, and *were in violation* of the "*contract rights secured to said mortgagors and to said trustees* under "*said mortgage* at the *time of its execution*, and *were consequently* "*utterly void;* and they deny that said alleged foreclosure did, or "could, in any way, by law, whether valid or invalid, "inure to the "benefit of the 'Somerset Railway' [as alleged and claimed in the "bill,] if by that phrase it is intended to allege that the title of the "trustees under the mortgage of July 1, 1871, vested in said "Somerset Railway, and deprived the bondholders under said mort- "gage of their security upon said property." (Transcript of Record, Pages 30, 31.)

All these allegations appear in the *pleadings* of the parties. As already remarked, they bristle with Federal questions. And the *evidence* and the *statutes of the state, raise the same questions.* And they all result in the single inquiry by this Court, whether the mortgage of July 1, 1871, has been impaired by the subsequent legislation of the state.

The Supreme Court of Maine did not sustain the alleged foreclosure set out in paragraph 10 of the bill in equity of the defendants in error. But they did sustain the claim that without any foreclosure of the mortgage of July 1, 1871, and against the provisions and stipulations of the mortgage itself, the title of the plaintiffs in error as trustees and mortgagees, and the rights secured to the bondholders under it, had, by force of the subsequent legislation, been transferred to the "Somerset Railway," and the trustees and bondholders stripped of all the contract rights secured by the mortgage; and the trustees required by the decree of the court to convey their title to said Somerset Railway Company. [Record, p. 223, 224, 225.]

Twice recently the Chief Justice of this Court has stated in few, but clear words, the rule of the Court relating to Federal questions. In delivering the opinion of the Court in *Powell* v. *Brunswick County*, 150 U. S. 440, and in *Louisville & Nashville Railroad* v. *Louisville*, 166 U. S. 715. he said: "If it appear from the record by "clear and necessary intendment that the Federal question must "have been directly involved so the State Court could not have "given judgement without deciding it, that will be sufficient."

In the cases at bar the plaintiffs in error acquired title to the railroad property in dispute under the mortgage of July 1, 1871, with its special conditions, stipulations and agreements. This is admitted. The defendants in error claim title to the same property by force of a statute enacted twelve years afterwards, in direct violation of those special conditions, stipulations, and agreements. The plaintiffs in error say that the statute and the proceedings authorized by it, impaired the obligation of the mortgage contract

which vested the title in them; and that the construction and effect of that statute as given by the Supreme Court of Maine, destroyed the mortgage contract That the only title claimed by the defendants in error is under this state statute. That where the title of the plaintiff is good, unless the statute of a state under which the defendant claims, gives the defendant a title, and the defendant has no other title, a decision in the defendant's favor is necessarily in favor of the validity of the statute. These were the only questions before the Court below; and the court could not have given the judgment they did without sustaining the validity of this statute, and holding that it transferred the title of the plaintiffs to the defendants. The question then arises instantly whether the statute, as construed by the court below, does not impair the obligation of the mortgage contract?

It is not easy to see how a Federal question can be more plainly and directly raised. The sole purpose of the bill in equity was to compel a transfer of the contract-title of the plaintiffs in error to the defendants in error by force of the subsequent statute title of the latter. Nothing but Federal questions were involved in the case.

The dissenting opinion of *Mr. Justice Emery*, concurred in by *Mr. Justice Whitehouse*, who delivered the opinion of the Court when the case was *first* before it, so shows.

This dissenting opinion is a very able exposition of one branch of the Federal questions involved in these cases, and is adopted as part of the argument of the plaintiffs in error.

In this discussion of the defendants' motion to dismiss, nearly all of the legal questions involved in these cases have necessarily been referred to.

The facts and evidence in the record require a further examination, and statement of the cases.

The Somerset Railroad Company was incorporated by act of the legislature of Maine in 1860.

Special Laws of 1869, Chap. 465, (Charter printed as part of this brief.)

By the law of Maine "all acts of incorporation shall be deemed public acts."

Rev. Stat. 1841, ch. 1, and Rev. Stat., 1883, ch. 1, sec. 6.

The road runs from West Waterville, now called Oakland, northerly through the towns of Fairfield, Norridgewock, Madison, Anson, Embden to Solon, a distance of about 34 miles. By an act of the legislature on Feb. 24, 1871, the "Somerset Railroad Company was authorized to locate and extend its railroad from Solon to Bingham Village about seven miles further North." Special acts of 1871, chap. 703.

In 1868 the legislature authorized the town of Anson and other towns to aid in the construction of the road. Special Laws of 1868, ch. 622. [Printed.]

By another act of same year the corporation was required to complete the road to Solon Village by March 1, 1872. Special Laws of 1868 chap. 544.

On July 1, 1871, the Somerset Railroad Company voted to issue its bonds for a sum not exceeding $500,000 to secure completion of the road to Solon, a distance of 34 miles. The road was then chartered through to Bingham.

A mortgage was duly executed to secure payment of the bonds, and $450,000 of bonds were actually issued and signed in the manner prescribed by the mortgage, payable in twenty years with interest at 7 per cent.

Mortgage covered all real and personal property then existing, and all to be thereafter acquired. This mortgage was duly recorded on Aug. 31, 1871. It contained the following conditions: "Provided, however, if the said company shall pay said bonds "and coupons as they severally become due, and do and perform all "on their part to be done and performed as hereinafter stipulated, "this deed shall be null and void, otherwise of full force. This "conveyance is made to said grantees for the benefit of the holders "of the bonds of said company, to be issued as herein provided "upon the trusts and stipulations following:

"*First.* Said grantees hereby accept said trust and hereby "covenant with said company to perform it faithfully according to "the stipulations of this deed, and the provisions of law.

"*Second.* It is agreed that said company shall keep said prop- "erty in good repair.

"*Third.* Any omission of said company to pay any of said bonds "or coupons as they become due, or to perform any other engage- "ment herein contained to be performed by it, shall constitute a "breach of the condition of this deed, and said trustees for the "purpose of enabling them to perform any lawful acts, to cause a "foreclosure of this mortgage for conditions broken, shall be the "sole judges *prima facie* of said breach of conditions; and said "company shall submit without resistance to any act of theirs for "such purposes, not being bound by their judgment in a final trial "and decision respecting a breach of condition.

"*Fourth.* Said company shall be entitled to the possession and "management of said property until breach of condition of this "mortgage, and also in case of breach of condition where "subsequent performance by it is accepted.

"*Fifth.* Said trustees shall in no event be personally liable for "the doings of each other. Each is to be accountable for his own "misdoings, only. A majority of them may do any act herein "provided for when it appears that the other had notice and "declined to act, or omitted to attend a meeting duly notified, "when that matter was to be under consideration."

There are other provisions in the mortgage, a copy in full of which

is set out in the Transcript of Record, Pages 17, 18, 19, and also Pages 83, 84, and 85.

At the time when this mortgage was made, July 1, 1871, the laws of Maine relating to railroad mortgages, provided for taking possession of the property by the trustees and applying the income towards the payment of the bonds and interest, and also provided the manner of foreclosing the mortgage, and are found in the Rev. Stat. of 1871, which took effect February 1, 1871.

By chap. 51, Rev. Stat. of 1871, the provisions are as follows:

SEC. 48. "The neglect of the corporation to pay any overdue "bonds or coupons secured by such mortgage, for ninety days after "presentment and demand on the treasurer or president thereof, "shall be a breach of the conditions of the mortgage; and there- "upon the trustees shall call a meeting of the bondholders, by "publishing the time and place thereof three weeks successively in "the State paper, and in some paper in the county where the road "lies, the last publication to be one week at least before the time of "the meeting.

"SEC. 49. At such meeting and all others, each bondholder "present may have one vote for each hundred dollars of bonds held "by him or represented by proxy; and they may organize by choice "of a moderator and clerk, and determine whether the trustees "shall take possession of such road, and manage and run it in their "behalf."

"SEC. 50. If they so determine, the trustees shall take posses- "sion of such road and all other property covered by the mortgage, "and have all the rights and powers, and be subject to all the "obligations of the directors and corporation of such road, and may "also prosecute and defend suits in their own name as trustees."

"SEC. 51. They shall keep an accurate account of all receipts "and expenditures of such road and exhibit it, on request, to any "officer of the corporation or other person interested. They shall "from the receipts keep the road, buildings and equipments in "repair; furnish such new rolling stock as is necessary, and the "balance after paying the running expenses, shall be applied "according to the rights of parties under the mortgage, and to the "payment of any damages arising from misfeasance in the manage- "ment of the road. They shall not be personally liable except for "malfeasance or fraud."

"When all over due bonds and coupons secured by the mortgage "are paid, they shall surrender the road and other property to the "parties entitled thereto."

"SEC. 52. They shall annually * * * call a meeting of the "bondholders, and report to them the state of the property, the "receipts, expenses and the application of the funds. At such "meeting, the bondholders may fix the compensation of the "trustees; instruct them to contract with the directors of the "corporation or other competent party, to operate said road while

"the trustees have the right of possession if approved by the bond-"holders at a regular meeting, otherwise not exceeding two years, "and to pay to them the net earnings thereof; or give them any "other instruction they deem advisable; and the trustees shall "conform thereto, *unless inconsistent with the terms of the trust.*

"SEC. 53. The trustees on application of one-third of the bond-"holders in amount to have such mortgage foreclosed, shall imme-"diately give notice thereof by publishing it three weeks successively "in the state paper, and some paper, if any, in each county in "which the road extends, therein stating the date and conditions of "the mortgage, the claims of the applicants under it, that the condi-"tions thereof have been broken, and that for that reason they "claim a foreclosure; and they shall cause a copy of such notice "and the name and date of each newspaper containing it, to be re-"corded in the registry of deeds in each county, within sixty days "from the first publication; and *unless within three years from the "first publication*, the mortgage is redeemed by the mortgagors, or "those claiming under them, or a bill in equity as in cases of the "redemption of mortgaged lands commenced founded on payment "or a legal tender of the amount of overdue bonds and coupons, "or containing an averment that the complainants are ready and "willing to redeem on the rendering of an account, the right of "redemption shall be forever foreclosed."

"SEC 54. Each holder of overdue bonds or coupons shall present "them to the trustees at least thirty days before the right of re-"demption expires, to be by them recorded; and such right shall "not be lost by the non-payment of any claims not so presented; "and the parties having the right to redeem shall have free access "to the record of such claims."

"SEC. 55. The foreclosure of the mortgage shall enure to the "benefit of all the holders of bonds, coupons, and other claims se-"cured thereby; and they, their successors, and assigns are consti-"tuted a corporation as of the date of the foreclosure, for all pur-"poses, with all the rights and powers, duties and obligations of "the original corporation by its charter; and the trustees shall con-"vey to such new corporation by deeds all the right, title and inter-"est which they had by the mortgage and the foreclosure thereof, "and thereupon they shall be discharged. If they neglect or refuse "so to convey, the court, on application in equity, may compel "them to do so."

"SEC. 56. The new corporation may call its first meeting in the "manner provided for calling the first meeting of the original cor-"poration and use therefor the old name; but at that meeting may "adopt a new one by which it shall always after be known; and it "may take and hold the possession, and have the use of the mort-"gaged property, though a bill in equity to redeem is pending, and "may become a party defendant to such bill."

Such were the provisions of the law in force when the mortgage of July 1, 1871, was executed; and bonds to the amount of $450,-

000 were issued and left in the hands of the president and treasurer of the corporation. The town of Anson subscribed $80,000 to the stock of the road and took also $27,500 of the bonds in 1871 and issued its own bonds for the full amount of both, on which it has paid interest half yearly ever since.

Bonds to the undisputed amount of about $300,000 have been sold to the public, and the proceeds invested in building the road from West Waterville to Anson village, a distance of 25 miles. The balance of the $450,000 is in dispute, as appears in the answer to the bill in equity and subsequently in the evidence. (Record, pages 27 and 28.)

The *offices* of the Somerset Railroad Company, and of the "Somerset Railway Company" have always been kept in a building at West Waterville, now Oakland, owned by the Dunn Edge Tool Company, so called, and rented of that company (Record, 156 and 157,) composed of Reuben B. Dunn, R. Wesley Dunn, his son, and John Ayer, with A. R. Small for bookkeeper and clerk.

Of this company Reuben B. Dunn was president, John Ayer, treasurer, usually—sometimes president. (Record, page 109.) Treasurer since 1868. (Record, 126.)

Reuben B. Dunn and *R. Wesley Dunn* and *John Ayer* were *always directors* in the *Somerset Railroad Company*, as the records of the company show. (Record, 106, 107.) *John Ayer* was always *president of that company after June* 1872. (Record, page 135.)

A. R. Small was treasurer of the *Somerset Railroad Company* always after 1873. (Record, page 113.)

A. R. Small has been clerk and bookkeeper, and in the employ of the Dunn Edge Tool Co. ever since 1868. (Record, 123.)

So that it will be noticed that the president, treasurer and bookkeeper and clerk of the *Dunn Edge Tool Co.*, were the president, treasurer and director of the *Somerset Railroad Company*, from 1872 to 1883, and ever since, and of the "Somerset Railway Company" ever since 1883, facts which have a bearing upon some features of the case, which will require consideration if the motives of parties are ever important in the consideration of a Federal question.

In 1875, A. R. Small, treasurer of the Somerset Railroad Company, by the direction of John Ayer, president of the Somerset Railroad Company, paid to John Ayer as treasurer of the Dunn Edge Tool Co., interest coupons to the amount of $6,500.00, and to Reuben B. Dunn personally interest coupons to the amount of $686.00.

A few favorites were paid small sums, but nearly all the interest coupons paid that year were paid to John Ayer as treasurer of the Dunn Edge Tool Co., and to Reuben B. Dunn, who was president of that company. (Record, p. 125 and 126.) John Ayer is described as "one of the managing men of the Dunn Edge Tool Company as well as treasurer" of that company. (Record, p. 126.)

The bondholders generally received nothing for the year 1875, and had no knowledge of the payment of these large sums to Dunn and Ayer and to the Dunn Edge Tool Co., upon their interest coupons.

The records of the Somerset Railroad Company kept by Ayer & Small fail to show what appropriation was made of the income of the road after 1878. The road was completed to Anson, 25 miles, through one of the best sections of Maine, in 1876; yet no evidence is offered as to what disposition was made of the gross receipts, or of the income of the road down to 1887.

Twelve years after the incorporation of the road, John Ayer and the Dunn Edge Tool Co. and Reuben B. Dunn, the parties who had appropriated the funds of the road to the payment of their own interest coupons in 1875, and who offer no evidence as to its disposal afterwards, down to 1887, procured an act of the legislature of Maine, without the slightest notice to the other bondholders, authorizing *a part* of the bondholders to form a new corporation in a manner wholly different from that provided by the law existing when the mortgage was executed, and in entire disregard of the stipulations and provisions of that mortgage; and four years later, Aprill 11, 1887, procured another act transferring bodily to the new corporation the title of the trustees, and of the minority bondholders, without any foreclosure; or, if a subsequent foreclosure was resorted to, the title should vest in *the new corporation* instead of *in the trustees* under *the mortgage*, as provided by the law in force when the mortgage was made. (Record, page 108, 109.) (Act of April 11, 1887, printed.)

The first legislative act procured by these parties was passed *March* 6, 1883, and its chief provision was as follows: "Whenever "the principal of any scrip or bonds issued by a railroad corpora- "tion shall have been due and payable more than three years, or no "interest has been paid thereon for more than three years, a corpor- "ation formed by the holders of such scrip or bonds, or if no such "corporation has been formed, the holders of not less than a major- "ity of such scrip or bonds, may commence a suit in equity for the "purpose of foreclosing such mortgage; and the court may decree "a foreclosure of such mortgage, unless the arrears are paid within "such time as the court may order."

Undoubtedly the parties who procured the passage of this act supposed and intended that a foreclosure by bill in equity in the manner provided by this act, would *vest the title under the mortgage in the persons who should bring the bill in equity.*

Immediately after the passage of this Act, Reuben B. Dunn, *the president of the Dunn Edge Tool Co*, and John Ayer the *treasurer of that Company*, but also *president of the Somerset Railroad Company*, in behalf of themselves and of the Dunn Edge Tool Company, composed of themselves and R. Wesley Dunn, and A. R. Small, their clerk, alleging that they held a majority of the bonds, brought their bill in equity to foreclose the mortgage of July 1, 1871.

This bill was brought April 18, 1883, (Record p. 83.) No time was lost after the passage of the act was secured; and it will be noticed that the same counsel that brought the bill in equity were the same that procured the passage of the Act. (Record p. 83, 108, 109.)

Early in the summer of 1883, the opinion of the Supreme Court of Maine in *Stratton* v. *E. & N. A. Railway Co.*, 74 *Me.* 422 was published. In that opinion the Court said: "The trustees act for "the bondholders, but they act for the original corporation as well, "and are liable to account to it for their doings. *R. S.* 1871, *ch.* 51, "*sec.* 51. The legal title to the road is in them, and when in their "possession, is operated upon their own responsibility as trustees "indeed, but controlled only *by the terms of the trusts as found in* "*the mortgage* and *the statutes in relation thereto. Even after the* "*foreclosure* the *new corporation* obtains *title only* by a *conveyance* "*from the trustees. Rev. Stat.* 1871, *ch.* 51, *sec.* 55. They are "principals, rather than agents, operating the road as an independ- "ent body, as trustees, accountable to all persons interested for the "faithful discharge of their trust."

Under this decision it was plain that the foreclosure by bill in equity under the new act just procured, left the title still in the trustees, and would not vest in the complainants in the bill in equity as was intended. The next step was the formation of the "Somerset Railway" on Aug. 15, 1883, under the same Act, the details of which are found in the evidence—the chief actors in which are Reuben B. Dunn, John Ayer, The Dunn Edge Tool Co. and the same counsel. They appear to have got control of one of the trustees Mr. S. D. Lindsey, who seems to have forgotten that he was trustee not only for *all* the bondholders, but for the Somerset Railroad Company as well, the mortgagors who had appointed him. He seemed to forget that it was his duty to protect them if possible from foreclosure, and from a loss of their property. *Kennebec & Portland R. Co.* v. *Portland & Ken. R. Co.*, 59 *Me.*, 45, 46, 47, 48. The evidence is convincing and uncontradicted that he aided Dunn and Ayer, and their counsel, in all their schemes to get possession and control of the road regardless of the rights of the mortgagor or of the other bondholders. (Record p. 95, 96, 97, 75 and 53). He even undertook to buy in the equity of redemption under his own mortgage for the new corporation formed of only part of the bondholders. (Record p. 76.) It was upon his motion that the road was surrendered to the new corporation on Sept 1, 1883, (Record p. 75,) and he actually became a director in the new corporation. (Record, p. 53.) Such conduct was in gross violation of his duties as trustee under the mortgage of July 1, 1871. 2 Cook on Stockholders, etc., 3rd Ed., Sec. 815; *Ashuelot R. Co.* v. *Elliot*, 52 *N. H.* 397; *Sahlgard* v. *Kennedy*, 1 *McCrary*, 291. If Dunn and Ayer and Lindsey wanted an honest deal for the benefit of *all* the mortgage bondholders, they held more than the necessary one-half of the bonds, and could at any moment require the trustees to take possession of the road under Sect. 48 and 49 of Chap. 51 of the laws

in force when the mortgage was made, and manage it without any foreclosure for the benefit of *all the bondholders*, and apply the yearly income of the road to the payment of the interest as it became due. But of course under this *public management* of the road, *every bondholder* must be paid *pro rata* his *share of the net income*.

It could not be appropriated to the payment *only* of *Dunn and Ayer coupons*. Or Dunn and Ayer, who made up the Dunn Edge Tool Co., could at any time bring about an honest foreclosure under Sec. 53, by applying to the trustees under that section. And they could have retained possession of the road under Secs. 48 and 49 *during the entire three years that the foreclosure must run*, applying *the income* for *the benefit of every bondholder*. But this was not what they wanted. This kind of foreclosure was too public. Notice must be given three weeks in the state paper, and as many also in papers published in two counties, Kennebec and Somerset, and must then be recorded in the public Registry of Deeds in each county. It is evident that the Somerset Railroad Company, when it executed the mortgage of July 1, 1871, and issued its bonds under that mortgage, intended to rely, and had the right to rely upon having ample notice for three years of the impending foreclosure, so that they could not be deprived of their property by any possible contingency until the full expiration of the three years. And it is equally evident that the legislature intended that no foreclosure should take place until every stockholder, every bondholder and every creditor of the original mortgagors, and the whole general public, should have equally full and ample notice of the threatened foreclosure, and abundant opportunity to protect any rights they might have in the property. Not a day could be chipped from the three years given by the law when the mortgage was made.

Bronson v. *Kinzie*, 1 *How.* 311; *Brine* v. *Ins. Co.*, 96 *U. S.* 627.

Of course Dunn, Ayer and Lindsey, and their counsel, knew that these provisions of law and the provisions of the mortgage itself, were amply sufficient to give to the trustees possession of the road and the control of its income; and the trustees could foreclose at any moment when it was deemed advisable to do so. But the *trustees* must act for *all* the bondholders; and by law, they knew that *each bondholder* would be entitled to be paid *pro rata* out of the income of the road. This was not what they wanted. Hence their procuring the act of March 6, 1883, by which a *majority* of the bondholders (which they were,) could organize a new corporation, and take the whole title to themselves by way of a bill in equity, as they supposed and intended.

This would give them possession of the road and its revenues and shut out the minority bondholders. And this was the scheme attempted. Mr. A. R. Small, who had been connected with Dunn and Ayer, as their clerk, since 1868, (Record 127,) was the treasurer of the Somerset Railroad Company, and upon him the bill in

equity was served, *which was the only notice given to anybody* of *the threatened foreclosure*. (Record p. 192 and 127.

A very different proceeding from that required by the law when the mortgage was made. No service was made on *the trustees*, although all were then alive, and one of them working directly in the interest of Dunn and Ayer, and the Dunn Edge Tool Company, and against the interests of the Somerset Railroad Co., that appointed him trustee. *The trustees were not made parties to the bill.* And the inference is fair that the other two could not be influenced into such a proceeding, and were designedly kept in ignorance of it.

In some way it leaked out that Dunn and Ayer, and the Dunn Edge Tool Co., were endeavoring to get control of the road and to keep it, and four *minority directors* employed counsel to oppose the bill in equity, who entered an appearance and filed a demurrer to the bill, assigning special causes of demurrer, among which were that the trustees of the mortgage to be foreclosed were not made parties to the bill; and that by the specific provisions of the mortgage contract the trustees were made *sole judges prima facie* of the breach of the conditions of said mortgage, and that there was no allegation in the bill that they have ever acted on that question, or adjudicated that there was a breach of said conditions; and because the statute of 1883, chap. 166, sec. 4, is inconsistent with the terms and conditions of the mortgage itself. (Record 189, 190.)

This demurrer was filed July 3, 1883. (Record, 189.) No adjudication was had upon this demurrer until the Oct. Term, 1884. In the meantime and *soon after the demurrer* was *filed*, the *four minority directors* were displaced (on *Aug.* 15, 1883,) by the election of a *new board of directors* by *Dunn and Ayer, and the Dunn Edge Tool Co., holding a majority* of the *bonds*, and the opposition being thus withdrawn, the demurrer was overruled, and *without answer* or *even* taking the bill *pro confesso*, or the appointment of a master to report the amount due a decree of foreclosure was entered at the Oct. Term, 1884. (Record, p. 47, 53, 87, 189, 190, 191.) The decree was in the following words: "This case came "up for hearing at the term of said court held in and for said "county on the third Tuesday of Octeber, A. D. 1884, when the "respondents' demurrer to the bill of complaint was overruled, and "it appearing to the court that the several allegations in the bill of "complaint were true, it was ordered, adjudged and decreed that "upon the defendants paying the amount of coupons then overdue "as particularly alleged in said bill on or before the first day of "July, A. D. 1885, said complainants take nothing by said bill. "But in default of said defendants paying the amount of said "coupons as aforesaid, *by the time aforesaid*, it was ordered and "decreed that the said defendants do stand absolutely debarred and "foreclosed of and from all equity of redemption of, in and to said "mortgaged premises." (Record, p. 86 and 87.) It will be noticed that this decree gave less than *nine months time* for *redemption* in

place of the three years secured under the mortgage contract; while the confirmatory decree of March 31, 1887, if it does not relate back to the previous decree simply, but is to be regarded as a substantive decree, *per se*, still shortens the time of redemption secured by the mortgage *more than six months.*

Immediately after procuring this confirmatory decree, on March 31, 1887, these same gentlemen secured on April 11, 1887 the passage of an act by the legislature of Maine vesting the title of the trustees under the mortgage of July 1, 1871, in the new corporation, the "Somerset Railway." (Record, p. 108 and 109.) Laws of 1887 chap. 103.

In April 1884 one of the trustees died. In May 1890 another. (Record, p. 7.)

Believing that the subsequent legislation affecting the mortgage of July 1, 1871, and all the proceedings under such legislation to be void as impairing the obligation of the mortgage contract, and finding that the parties who controlled the railroad and its income, were misappropriating that income to the payment of a new and subsequent set of bonds, instead of applying it upon the first mortgage bonds, the town of Anson holding $80,000 of the stock of the road, and $27,500 of the first mortgage bonds, together with other holders of bonds, amounting in all to $78,100 (*Ins. of Anson et als, Pet.*, 85 Me., 85,) on July 2, 1890, filed a bill in equity in the Supreme Court of Maine for the appointment of new trustees to enforce the mortgage of July 1, 1871. Notice was duly given by order of court, and the alleged new corporation, the "Somerset Railway," the present defendants in error, appeared and opposed the appointment of trustees to enforce the mortgage. The alleged trustees of the new corporation also appeared and opposed such appointment. They all filed answers in which it was claimed that the new corporation had been legally organized under the provisions of the Rev. Stat. of 1883 and subsequent acts additional and amendatory, (the only amendatory or additional act, however, being the act of April 11, 1887,) and were in possession of the road, and were operating it for the benefit of the Somerset Railway. That the new corporation had acquired the legal title to the road by force of subsequent legislation, and the proceedings under it, and that the mortgage of July 1, 1871, "had become *functus officio*, and invalid, and that no "valid appointment of trustees can be made under it, and that it "has ceased to be security for said bonds; that the purpose of the "complainants is to have trustees appointed for the purpose of taking "possession of the road now in possession of said "Somerset Rail-"way," and such conduct would destroy the value of the bonds "($225,000) issued by said "Somerset Railway." (Record, p. 180, 181, 182, 183.) The answers also alleged that the mortgage of July 1, 1871 had been foreclosed by decree of the Supreme Court April 1, 1887, and that the Somerset Railway had purchased the right of redeeming the mortgage of July 1, 1871 at a sheriff's sale on execution. They claimed that by the organization of the new cor-

poration under the Rev. Stat. of 1883, and the proceedings authorized by it, and by force of the act of April 11, 1887, the "Somerset Railway," had acquired the title of the trustees and of the mortgage bondholders under the mortgage of July 1, 1871, which had thereby become *functus officio*, and invalid, had ceased to be security for the bonds and no trustees should or could be appointed. (Record, p. 182, 183,) and would be "a gross violation of law." (Record, p. 186.)

The evidence taken on both sides was voluminous, containing all the records of all the proceedings, and the other proof, precisely as in these cases at bar; and the cause was heard before the Supreme Court of Maine on bill, answers, and proof, at the Law Term in Penobscot County, June 1891. A year and more afterwards viz. on Aug. 13, 1892, the opinion of the Court was announced. *Inh. of Anson et als., Pet.*, 85 Me., 79.

The arguments of counsel are fully reported in that case. The same questions were raised and argued as in the cases at bar—questions of constitutional law—the petitioners claiming that the statutes of 1883, and 1887, and the whole proceedings under them including the attempted foreclosure by bill in equity, and the formation of the new corporation, the "Somerset Railway," by *part* of the mortgage bondholders, were unconstitutional and void as against the trustees, the bondholders and stockholders, and that said trustees, bondholders, and stockholders had the right to rely upon the provisions and stipulations of the mortgage and the laws in force when it was executed. 85 Me., 80, 81, 82.

On the other hand the learned counsel for the Somerset Railway Co., insisted that the acts of 1883 and 1887 were valid, and also the foreclosure and organization of the new corporation under them. That it had acquired the title of trustees and bondholders under the mortgage of July 1, 1871, which has thereby become *functus officio* and void; and that the petitioners were estopped by *laches*, and no trustees should be appointed to enforce the mortgage for their benefit. 85 *Me.*, 82, 83, 84.

The Court sustained none of the positions of the "Somerset Railway" in their answers. They held that the mortgage was not *functus officio*, but was valid, and directed the appointment of trustees to enforce its provisions for the benefit of the outstanding bondholders; that there was no laches, and, in substance, from the nature of the situation, could not be. 85 *Me.*, 87. The court did not then undertake to determine whether the bondholders who had engineered the new corporation could still be considered as secured by the mortgage. They had cancelled and surrendered their bonds. And as against the other bondholders their *status* was certainly matter of doubt. But as to all other bondholders who had taken no part in the attempt to form the new corporation, the Court held the mortgage to be in full force and life, and that they were entitled to have new trustees appointed to enforce the provisions of the mortgage for their benefit.

And the Court also held that the *Somerset Railroad Company*, the *original mortgagors*, were in full life, and were entitled to be heard upon the question as to who the new trustees should be, and *must be made a party*. The orders of the Court were carried out. Lewis Pierce the surviving original trustee, and the original mortgagors, the Somerset Railroad Company, were made parties and appeared at the next term of the court in the county where the suit was pending, viz. the Oct. term 1892 in Kennebec County, and two of the present board of trustees were then duly appointed to fill the vacancies in the mortgage; and conveyances to them were duly made by the original trustee, Lewis Pierce. (Record p. 7.)

These vacancies being filled under and by the order and decree of the full Law Court of Maine for purpose of enforcing the security afforded by the mortgage, it became a grave question as to the *mode of proceeding* by the trustees. The decision of the court that the Somerset Railroad Company, the original mortgagors, were unaffected by any of the proceedings under the subsequent legislation, and must be made parties and be heard in the appointment of new trustees, was only another way of saying that the alleged new corporation, the "Somerset Railway Company," had no legal existence. The *two* could not exist *at the same time*. The *life* of the *new*, depended upon the *death* of the old.

It was plain beyond apparent doubt that the court regarded the subsequent legislation as impairing and violating the contract rights secured under the mortgage of July 1, 1871, which had never been legally foreclosed; and until foreclosed under the stipulations of the mortgage, and in the manner provided by the law in force when the mortgage was executed, there *could* be *no new corporation* which could acquire the title of the trustees under the mortgage. They had so decided the same year (1871) the mortgage was made in another case, viz., *Kennebec & Portland R. R. Co.* v. *Portland & Kennebec R. R. Co.*, 59 *Me.*, 20 *and* 54. The Court evidently held also that the alleged sale of July 8, 1884 of the equity of redemption was void, because there was no *new corporation* which *could purchase it.*

Stratton v. *E. & N. A. Railway*, 74 *Me.*, 425.

If this sale had been valid, it would have extinguished all the right of the Somerset Railroad Company, the original mortgagors, to the property covered by the mortgage, and of course the Court would not have required that *they should be made a party, and must be heard* in relation to the *appointment* of *new trustees* to *enforce that mortgage.*

In the case already cited, *Ken. & Port. R. Co.*, v. *Port. & Ken. R. Co.*, 59 *Me.*, 21, the court said: "The complainants recognize "the existence of the corporation thus formed by instituting this bill "against them, and requiring them by the new name to answer."

Understanding from the decision of the Court that the new corporation had no legal existence as against the trustees and first mortgage bondholders, because if it had, and acquired the title to the

whole railroad property by force of the subsequent legislation, it was inconceivable that the Law Court of Maine would appoint trustees to enforce a *dead title*, the question came back as to what course the trustees should take in order to enforce and execute the duties imposed upon them by the court. It was plain that they should obtain control of the road, and its income, which was being misapplied every day. If they brought a bill in equity against the "Somerset Railway Company," to obtain such control, they admitted its legal existence, when the court had said, in effect, it had none, and *could not, so long as the old corporation existed unforeclosed.* The whole railroad property was in the possession of men who had no right to it as against the trustees. The net income was about $25,000 yearly, of which $11,250 was wrongfully applied on the interest of the $225,000 bonds of the new corporation, and nothing towards the interest of the first mortgage bonds represented by the trustees. (Record p. 128, 129, 130, 131, 132.) They were simply disseizors, and liable as such to the trustees who, by the decision of the court, held the *legal* title for themselves, and the beneficial title for the first mortgage bondholders.

Against these disseizors no bill in equity could be maintained, because the plaintiffs, the trustees, had ample remedy at law. Both the common law of Maine, and the special statutes of Maine relating to railroad mortgages in force on July 1, 1871, and continuously and specially kept in force ever since and the general mortage statutes of Maine, gave the trustees full and ample remedy by writ of entry on the mortgage to recover the railroad property.

Rev. Stat. 1871, *Chap.* 90, *Secs.* 1 *to* 15.
Rev. Stat. 1871, *Chap.* 51, *Sec.* 70.
Rev. Stat. 1871, *Chap.* 104, *Secs.* 1 *to* 15.
Rev. Stat. 1883, *Chap.* 90, *Secs.* 1 *to* 15.
Rev. Stat. 1883, *Chap.* 51, *Sec.* 108.
Rev. Stat. 1883, *Chap.* 104, *Secs.* 1 *to* 15.

(These statutes are all printed as part of this brief for the plaintiffs in error.) A writ of entry upon a mortgage is, by the laws of Maine and Mass., substantially a bill in equity in which the rights of all parties are determined upon the principles of equity and good conscience.

Opinion by *Mr. Justice Gray*, *Holbrook* v. *Bliss*, 9 *Allen*, 69.
2 *Jones on Mortgages*, *Sec.* 1296.
Davis v. *Thompson*, 118 *Mass.*, 499.

Such a suit against mere trespassers, would entitle the plaintiffs to judgment for the property, and damages for its detention and use and income under the statutes of Maine. Against parties actually holding the right of redemption, or claiming under them, judgment would be for the amount found to be due in equity and good conscience under the provisions of the mortgage, with right of payment within two months. If not paid within that time, trustees to have possession of the mortgaged property.

A writ of entry upon the mortgage has always been the usual remedy in Maine, Mass. and New Hampshire for the recovery of railroad property. 2 *Jones on Mortgages, Sec.* 1307.

York & Cumberland R. Co. v. *Myers*, 41 *Me.*, 109, 119.
Wood v. *Goodwin*, 49 *Me.*, 262.
Kennebec & Port. R. Co. v. *Portland & Ken. R. Co.*, 59 *Me.*, 25, and 31.
Haven v. *Grand Junc. R. Co.*, 109 *Mass.*, 89, 90.
Haven v. *Grand Junc. R. Co.*, 4 *Allen*, 81.
Haven v. *Adams et als.*, 8 *Allen*, 363, and 369.
Boston, Concord & Mont. R. Co. v. *Boston & Maine & Boston & Lowell R. Co.*, 65 *N. H.*, 393.

In this controversy in these famous cases in N. H., between these railroads, two bills in equity were dismissed, and the plaintiffs were held entitled to recover the railroad property and rolling stock at law in a writ of entry upon their mortgage, the court holding that they had ample remedy at law, and therefore bills in equity could not be maintained.

The trustees, therefore, the present plaintiffs in error, brought a writ of entry upon their mortgage to recover the railroad property against the parties in possession of it. Suit brought at the next term of the Supreme Court in the county after their appointment. *Hadley* v. *Hadley*, 80 *Me.*, 460.

Before this writ of entry could be tried at law, the new corporation, the "Somerset Railway Co.," brought the present bill in equity (No. 184 on the docket of this Court,) in Cumberland county, to restrain the trustees, the present plaintiffs in error, from prosecuting their suits at law in Kennebec and Somerset counties to recover the railroad property, and asking the court to enjoin such suits, and to declare the mortgage, under which the same Court, within six months previously, had appointed the plaintiffs in error to enforce its provisions, *functus officio*, and *void*, and *alleging precisely the same grounds* set *up in their answers* in 85 *Me.*, 79, and claiming that by force of the subsequent legislation and the proceedings under it, the title of the trustees under the mortgage had become vested in the new corporation, the "Somerset Railway," and asking the court so to declare and decree, and require the trustees, the present plaintiffs in error, to convey the whole railroad property to the "Somerset Railway"— every proposition of which the court had just decided against them by declaring the mortgage valid and appointing trustees to enforce it, and requiring the original mortgagors, the Somerset Railroad Co., to be made a party to the proceedings to enforce the mortgage.

And the Court turned squarely round and held that by force of the statutes passed twelve years after the mortgage was executed, and by force of the proceedings under those statutes, the title of the trustees and of the mortgage bondholders under the mortgage had become divested, without any foreclosure of the mortgage, and

without any of the proceedings required by the stipulations and agreements of the mortgage itself, and had vested in the new corporation calling itself the "Somerset Railway;" and they declared the mortgage of July 1, 1871, *functus officio* and void, and required the trustees to convey the whole railroad property to the new corporation, in violation, as these plaintiffs in error most respectfully contend, of the contract rights secured under the mortgage of July 1, 1871.

Somerset Railway v. *Pierce et als.*, 88 *Me.*, 86.

And this is the question now before this Court upon these writs of error.

Assignment of Errors.

The first four errors assigned relate to the effect given by the learned Supreme Court of Maine to the formation of the "Somerset Railway" under the subsequent legislation, and may, with the leave of the court, be considered together.

A somewhat careful examination of the history of railroad mortgages in the States of the Union, and the rights of the parties thereto, as determined by the Supreme Court of the United States, and by the various State courts, fails to discover an instance, until we reach the cases at bar, where the title vested in the trustees and mortgagees and bondholders, under a mortgage duly executed and recorded, has ever been held to be divested and transferred to other parties by force of subsequent legislation, and without any foreclosure.

In *Canada Southern R. Co.* v. *Gebhard*, 109 U. S., 527, a majority of this Court held that the rights of the bondholders and trustees under a *Canada* railroad mortgage, might be legally affected and controlled by a subsequent act of the Canadian Parliament, without a legal foreclosure. But in the opinion of the Court, and in the powerful dissenting opinion of *Mr. Justice Harlan*, it was expressly admitted that such legislation by a State would be void because impairing the obligation of the mortgage contract.

The majority opinion says: "The Dominion parliament had the "legislative power to legalize the plan of adjustment as it had been "agreed on by the majority of those interested, and to bind the "resident minority creditors by its terms. This power was known "and recognized throughout the Dominion when the corporation "was created, and when all its bonds were executed and put upon "the market. * * * * It takes the place, in England and "Canada, of foreclosure sales in the United States. (Pages 538 "and 539.)

The Court had previously said in the same opinion on page 535: "It seems to be eminently proper that where the legislative power "exists, some statutory provision should be made for binding the

"minority in a reasonable way by the will of the majority; and "unless, as is the case in the States of the United States, the "passage of laws impairing the obligation of contracts is forbidden, "we see no good reason why such provision may not be made in "respect to existing as well as prospective obligations." See also *Gilfillan* v. *Union Canal Co.*, 109 U. S., 404.

In the dissenting opinion of *Mr. Justice Harlan*, he says: "If "any State in this Union should assume to pass a law with refer- "ence to a railroad corporation she had created, requiring the "holders of its bonds, for which they had paid value, to surrender "them and take in their place others of less value, (having a less "rate of interest,) and payable at a different time, our courts, "Federal and State, would be constrained by their obligation to "support the constitution of the United States, to declare such "legislation to be in conflict with that instrument." (Page 542.)

It would be difficult to state the principle involved in the cases at bar so clearly as is done in this extract.

The Somerset Railroad Company was incorporated by the State of Maine. The plaintiffs in error, as trustees and mortgagees, and the bondholders, confessedly acquired title to the railroad property by the mortgage of July 1, 1871.

Twelve years afterwards the State assumed to pass a law by force of which and the proceedings under it, the bondholders who had paid value for their bonds, were required to surrender them and take in their place, *not even other bonds* of the *same corporation* at a less rate of interest, and payable at *a different time*, but *stock* in a *new corporation* already encumbered with an issue of bonds for $225,000, thus turning *first mortgage* bonds, *without any foreclosure of the mortgage*, into stock of a corporation organized under a subsequent statute in entire disregard of the provision and stipulations of the mortgage contract.

It is not easy to imagine, as it seems to the plaintiffs in error, a more flagrant instance of the destruction of the obligation and rights secured by contract, the slightest impairment of which is forbidden.

In *Farrington* v. *Tennessee*, 95 *U. S.*, 683, the court said: "The "constitutional prohibition applies alike to both executory and exe- "cuted contracts, by whomsoever made. The amount of the im- "pairment of the obligation is immaterial. If there be any, it is "sufficient to bring into activity the constitutional provision and "the judicial power of this court to redress the wrong."

The plaintiffs in error respectfully submit that this mortgage, by the laws of Maine, vested the legal title to the property in the trustees and mortgagees, the equitable title in the bondholders, and the right of redemption in the mortgagors—three classes of rights secured under the same contract, all being rights of property protected from impairment by any state legislation. That contract also provided the manner in which these several rights should be

enforced and protected. The trustees and mortgagees could become the absolute owners of the property, (and then only in trust,) *by a foreclosure*, and in no other way. The bondholders could take possession of it through the trustees without foreclosure, and apply the income to the payment of the bonds and coupons until fully paid; then they must restore it to the mortgagors. The rights of the mortgagors to redeem the mortgage could be taken away only in the manner agreed upon in the contract—by the adjudication of the trustees that there had been a breach of the conditions of the mortgage, followed by a notice of foreclosure published in the state paper and in some newspaper in each of the two counties, Kennebec and Somerset, in accordance with the provisions of the law in force when the mortgage was executed, which provisions made a part of the mortgage contract as fully as if specifically set out in it.

Von Hoffman v. *Quincy*, 4 *Wall.* 550.
Baonson v. *Kinzie*, 1 *How.* 311.
Barnitz v. *Beverly*, 163 *U. S.* 118.
Phinney v. *Phinney*, 81 *Me.* 450.
Peabody v. *Stetson*, 88 *Me.* 281, 282.

Nothing but a foreclosure as there provided, with three years right of redemption, and a *record of such foreclosure* in the *public Registry of Deeds* of *each county*, such record to be made *within sixty days after the first publication*, could take away the rights of the mortgagors secured by the terms of the mortgage.

No subsequent act of legislation could change, or in any manner affect these provisions and stipulations. They were part of the contract of July 1, 1871. Any variation from these specific requirements provided by the law then existing to protect the estate and rights of the mortgagors, even the neglect, or omission, to record the notice of the foreclosure in the public registry for a single day beyond the sixty, would render the foreclosure void, and the estate of the mortgagors would remain wholly unaffected by it.

Storer v. *Little*, 41 *Me.* 69, 71, 73.
Freeman v. *Atwood*, 50 *Me.* 474.
Hatch v. *Bates*, 54 *Me.* 41.

"The *record of the notice* of *a foreclosure* of a mortgage is the "*only proper evidence* of the time when the right of redemption will "be forever foreclosed."

Chase v. *Savage*, 55 *Me.* 543.

Let us now, in connection with this branch of the case, examine more particularly the opinion of the learned Court of the State, which was delivered by *Mr. Justice Strout*. He admits the proper execution of the mortgage of July 1, 1871, and the issue of $450,000 of bonds under it, and the appointment of Pierce, Holland and Lindsey as trustees and mortgagees under it, the subsequent decease of Lindsey and Holland, and the due appointment in 1892 of Heath and Drew, present plaintiffs, in their places. He says that for more than three years prior to July 11, 1883, the company had failed to

pay the interest on the bonds, and "thereby had made a breach of "the condition of the mortgage, though the principal of the bonds "was not then due." He then says: "The trustees under the "mortgage never entered into possession of the mortgaged proper-"ty, nor took any measures to secure a foreclosure of the mort-"gage; but the Somerset Railroad Company remained in possession "of all the property until the formation of a new corporation under "the name of the Somerset Railway. On the eleventh day of July, "1883, the holders of the mortgage bonds, to an amount largely "exceeding one-half of the same, elected in writing to form a new "corporation, and on the fifteenth day of August, 1883, did form a "new corporation under the name of the Somerset Railway as pro-"vided by Chap. 51 of the Revised Statutes and acts additional "thereto and amendatory thereof." 88 Me. Rep., p. 8 and 89. It should not be forgotten in this connection that the opinion was prepared in 1895, and the "Revised Statutes" referred to, were those of 1883, the last revision then and still in force. No *amendatory*, or *additional* act has been passed since 1883, except the act of *April* 11, 1887, the passage of which was procured, as already stated, by Dunn, Ayer, and the Dunn Edge Tool Co., (Record, p. 108, 109,) and which provided in terms that the title of the trustees and of the mortgage bondholders, where the interest was unpaid for more than threeyears, should vest without foreclosure, or with one, in a new corporation formed by a majority of the bondholders, without regard to the terms of the mortgage.

And this statute is directly referred to as the *foundation of the new corporation* at a meeting held *just a month*, (on the 11th of May, 1887,) *after its passage had thus been procured;* the same meeting at which the capital stock of the new corporation was voted to be fixed under Sec. 111 of Chap. 51 of the Rev. Stat. of 1883, at "the amount of the unpaid bonds and overdue coupons *taken at* "*their face* at the time of the organization of this corporation, to "wit, the fifteenth day of August, A. D. 1883, and must be divided "into shares of $100.00 each." (Record, p. 58 and 59.) And see also 88 Me, 89. This same statute is referred to Par. 5 and 10 of the present bill in equity of the defendants in error, as the foundation of their title to the Somerset Railroad Company's property, and as making the mortgage of July 1, 1871, "*functus officio*, and as "having ceased to become security for said bonds." (Record, p. 9 and 12.) The constitutionality of this statute, and its necessary effect in transferring the title of the trustees, and of the mortgage bondholders, to the alleged new corporation, was argued by the learned counsel for the defendants in error, when this case was first before the Supreme Court of Maine; and its validity was denied by the counsel for the plaintiffs in error. *Anson et als., Pet. for Appt. of Trustees*, 85 *Me.* 79, 80, 81, 82 and 83; and its constitutionality was not sustained by the court.

But to return to the opinion of the court below in the present cases: "In pursuance of the organization of the new corporation,"

continues the learned judge, "and by the consent of the Somerset "Railroad Company, the Somerset Railway, on the first day of Sep- "tember, 1883, took possession of the railroad and all other proper- "ty included in the mortgage, and have ever since held possession "of the same and operated the road. The trustees under the mort- "gage (of July 1, 1871,) have brought suits to recover possession "of all the property included in it, and mesne profits, against vari- "ous officers and servants of the Somerset Railway, which are now "pending. The bill prays to have *the title* and *possession* of the "*Somerset Railway* to the property *described* in the *mortgage de-* "*clared valid;* and *the mortgage of July* 1, 1871, *declared void*, and "the holders of outstanding bonds and coupons ordered to surren- "der the same in exchange for stock in the Somerset Railway; and "that the plaintiffs in the suits at law may be enjoined from prose- "cuting their suits, and from disputing the title and possession of "the Somerset Railway." (Record, p. 216.) This is a fair state- ment of the cases. It admits the title of the trustees, the plaintiffs in error in the present suits, to have been created by *contract—by the mortgage of July* 1, 1871. It admits the title of the defendant in error, the Somerset Railway, to have been created *by force of subsequent legislation.* He confesses that it has no other title. He claims no other. This instantly raises the great Federal question whether the subsequent legislation does not impair the obligation of the mortgage contract. This was the question, and the only question in the court below, and the only question now before this court.

In the court below the statute title was sustained. The contract title was destroyed.

The learned judge then refers to the manner of effecting a fore- closure by the trustees under the laws in force when the mortgage was executed, requiring notice to be published in the state and county papers three weeks successively, and recorded in the county registries, and giving the mortgagors three years in which to re- deem, and if not redeemed, providing for the *formation of a new corporation by all the bondholders* as of the *date of the foreclosure.*

He then says: "These provisions for perfecting the security of "the mortgage bondholders, and to enable them to realize their debts "by operation of law, must be treated as part of the mortgage con- "tract, and the rights thereby secured to the bondholders could not "be abridged or taken away by subsequent enactments. But it "was competent for the law-making power to change the form and "method of the bondholders' remedy, provided the new method "protected their rights as fully as that existing when the mortgage "was given.

"*Von Hoffman* v. *City of Quincy*, 4 *Wall.* 535; *Seibert* v. *Lewis*, "122 *U. S.* 2940; *Edwards* v. *Kearzey*, 96 *U. S.* 595; *Louisiana* v. "*New Orleans*, 102 *U. S.* 206."

He then refers to a statute of 1876 which, he says, gave to the holders of overdue bonds the benefits of the provisions of Chap. 51,

Rev. Stat. 1871 where the mortgage had been legally foreclosed; and to the statue of 1878, which, he says, applied to overdue bonds "in all cases in which the principal of said scrip or bonds shall have "been due and payable for more than three years, *in the same way* "*and to the same extent* as *if the mortgage had been legally fore-closed;*" and finally refers to the statute of March 6, 1883, by which, he says, "the act of 1878 was extended to apply to cases in which no *interest* has been paid for more than three years." It will be noticed that the statutes of 1876 and 1878 apply only to overdue bonds; and that the statute of 1883 was the *first* which applied to overdue *interest*, and the *first* which could be made to apply in the *present cases*. It will be noticed also that the statutes of 1876 and 1878 referred to by the learned judge simply *extend the provisions of Chap.* 51, *Rev. Stat.* 1871, *Secs.* 47 *to* 50 inclusive, *so as* to apply to, or "*give the benefit of them*" to the holders of overdue mortgage *bonds* whether foreclosed or not; and the statute of 1883 extends the same provisions to cases of three years of overdue *interest*. It might not be easy to determine just what was actually intended under and by force of these statutes. Extending 23 sections of a previous statute to existing contracts is not an easy matter, and would be pretty sure to change and impair them. But, as stated by this court in a late case, in an opinion delivered by *Mr. Justice White:* "The issue which we are to determine is not what interpretation "*should* be given to the statutes of the State of Louisiana, but "whether, accepting the meaning affixed to those statutes by the "court of last resort of the state, their provisions, as so interpreted, "are repugnant to the Constitution of the United States."

Costello v. *McConnico*, *S. C., U. S., Feb.* 1, 1898.

And the question here is whether accepting the meaning affixed to these statutes of Maine by the Supreme Court of that state, these provisions are repugnant to the Constitution of the United States.

It is further said in the opinion below: "The remedy by fore-"closure by the trustees existing when the mortgage of 1871 was "given, has never been abridged or taken away; but the subse-"quent statutes have *enlarged* and made *more efficient* the bondhold-"er's remedy. The new provisions in the subsequent acts, *enabled* "*a majority* in amount of the bondholders to *act directly without the* "*intervention of the trustees*, thus *simplifying the proceedings*. The "interest upon the mortgage bonds having been unpaid for more "than three years prior to July 11, 1883, the bondholders holding "$351,900 of the bonds secured by the morgage, on that day elect-"ed in writing to form a new corporation in accordance with Chap. "51 of the Rev. Stat. of 1871, *as amended by the acts of 1878 and* "*1883, instead of resorting* to a *foreclosure by the trustees*. It will "be noticed that the amendatory acts required the action of a ma-"jority in amount of the mortgage bondholders, while *the foreclo-*"*sure by the trustees* required the concurrence of only one-third of

"the amount. The proceedings to organize the new corporation "*under the amendatory acts*, appear to be in strict conformity there- "to; and the new corporation, under the name of the Somerset "Railway, thereby became a legal corporation on the fifteenth day "of August, 1883, and then became entitled to take and hold the "possession and have the use of the mortgaged property."

It will be perceived that by the construction and effect which this language gives to these subsequent statutes of 1878, and 1883, *the organization* of the *new corporation on Aug. 15, 1883, takes the place of*, and was *exactly equivalent* to a *foreclosure* by the trustees, *the three years of which expired on that day.* The new corporation organized on Aug. 15, 1883, acquired, the court say, *the same title on that day* that *the trustees* and *all the bondholders* would have acquired under *the foreclosure by the trustees*, and thereby "became "entitled to take and hold the possession and have the use of the "mortgaged property."

And the court refer directly to *Rev. Stat. of 1871, Sec. 56*, showing exactly *the title thus acquired* by *the new corporation.*

It cannot be successfully denied that this is the exact scope and effect of the judgment of the court,—changing and transferring in the twinkling of an eye, by force of subsequent legislation, the title of the trustees and first mortgage bondholders under a mortgage contract executed twelve years previously to secure the payment of bonds not due for eight years yet to come.

Let us consider the inevitable results of this opinion and judgment. On the morning of Aug. 15, 1883, the title of the trustees, and of the first mortgage bondholders, and the three years right of the mortgagors to redeem, were unquestioned, and stood exactly the same as when the mortgage was executed.

The trustees, who by the special provisions and stipulations of the mortgage were constituted sole judges of a breach of the conditions of the mortgage, had never made any adjudication upon the subject, or taken any measures to foreclose the mortgage, nor had they been asked to do so by any of the bondholders—thus showing that neither trustees nor bondholders deemed a foreclosure advisable.

But on Aug. 15, 1883, a new corporation, not formed in the manner provided by the mortgage, but by force of legislative acts subsequent to the mortgage, *eo instanti*, take the whole title under the mortgage—the organization of the new corporation being, as the court holds, the exact equivalent of a *foreclosure by the trustees*—thus cutting off the equity of redemption of the mortgagors, divesting the title of the minority bondholders, and turning the title of the trustees into a "dry trust" which they are required to release and convey to the new corporation, the bonds being declared paid, which could only be done by a thorough and absolute foreclosure, cutting off the equity of redemption.

So that, by force of a subsequent statute, the trustees in a railroad mortgage, and the holders of the bonds secured by that mortgage and not yet due, in a single day, without notice of any kind, are shorn of their title to the property, the mortgage declared *functus officio*, and the property given to third parties.

Such a proceeding would seem to be contrary to every principle of our government, and forbidden by our laws guarding the sanctity of contracts.

Boyd v. *United States*, *116 U. S. 635.*
Gulf, Colorado & Santa Fe Railway v. *Ellis*, *165 U. S. 154.*
Loan Association v. *Topeka*, *20 Wall. 655*, *663.*

The learned judge who delivered the opinion we are considering, assumes that the mortgage with all its conditions and stipulations was but part of the *remedy* which the existing laws give to the bondholders to enable them to collect their bonds, and, as such remedy, was open to any change by subsequent legislation which would, as he says, "*enlarge* and *make more efficient* the *bondholders'* "*remedy*." The plaintiffs most respectfully suggest that this was a grave and fundamental error. The mortgage was a *contract*—a contract under seal, securing to the trustees and bondholders *property rights*—just as much a contract as the bonds themselves, and equally entitled to protection from impairment.

In *Cargill* v. *Power*, *1 Mich. 371*, a case almost as famous as *Bronson* v. *Kinzie*, *1 How. 311*, or *Brine* v. *Insurance Co.*, *96 U. S. 627*, the Court said: "The remedy is that which the law gives "for the enforcement of contracts, within the meaning of which a "mortgage security does not come. A mortgage contract is no "more a remedy than the bond which accompanies it—they are "both the evidence of and security for the indebtedness, and the "one is as much subject to *legislative alteration* as the other; they "are both the subject matter and the foundation of *suits*, and these "suits as constituting the means of enforcing the one or the other, "are the *remedy* afforded by the law. The *remedy* is subject to leg-"islative modification; the *mortgage contract is not.* Its terms were "agreed upon by the parties, and they afford the rule for the meas-"urement of the rights of the mortgagor and mortagee."

See also *Sage* v. *Cent. R. Co.*, *of Iowa*, *99 U. S. 334*, *342*, *343.*
Chicago R. Co. v. *Fosdick*, *106 U. S. 47.*

In *McClelland* v. *Norfolk R. Co.*, 110 *N. Y.* 477, 478, the Court said: "This mortgage, in accordance with familiar rules, must be "construed according to the intent of the parties in making it, and "that intent, if its language is plain and unambiguous, must be de-"rived from an examination of the instrument itself. *That contains* "*the measure of the liability of the mortgagor*, as *well as a definition*

"*of the power, duties and rights of the trustees and bondholders* "*named therein.*" In *Coal Co.* v. *Blatchford*, 11 *Wall.* 177, this Court said: "In the case at bar the plaintiffs, (the trustees,) are "the real prosecutors of the suit. They are parties to *the mortgage* "*contract*, negotiating its *terms* and *stipulations*, and to them the "usual rights and powers of mortgagees are reserved, and to them "the usual obligations of mortgagors are made. *The right to use* "*different remedies is expressly provided upon default in the pay-* "*ments stipulated: and the adoption of either* rests *at the option* of "*the plaintiffs. So long as they do not refuse to discharge the trusts* "*reposed in them, other parties are not authorized to institute or pros-* "*ecute any proceedings for the enforcement of the mortgage, or to ex-* "*ercise any control over them.*" These doctrines and principles apply in all their force to the cases at bar, and render all attempts of *others* "to prosecute any proceedings for the enforcement of the "mortgage, or to exercise any control over the trustees," simply void, because impairing the mortgage contract, and the rights secured to the trustees under it. If a subsequent *State Constitution* cannot be allowed to impair or destroy a contract, a subsequent state corporation certainly cannot.

Dodge v. *Woolsay*, 18 *How.* 331.
Keith v. *Clark*, 97 *U. S.* 455.
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 *U. S.* 650.

When the mortgage of July 1, 1871, was made, the laws of Maine then in force provided two modes only of foreclosing a railroad mortgage, one by suit, a writ of entry upon the mortgage, which by special statute provisions has ever since been kept in force; the other by publishing notice of the intended foreclosure in the state and county paper three weeks successively, and recording such notice in the county Registry of Deeds within sixty days after the first publication. Whichever way was adopted by the trustees, three years right of redemption was secured to the mortgagors.

Bronson v. *Kinzie*, 1 *How.* 311.
Planters' Bank v. *Sharp*, 6 *How.* 327, 330, 331, 332.
Brine v. *Ins. Co.*, 96 *U. S.* 627.
Barnitz v. *Beverly*, 163 *U. S.* 118.

"The duration of the mortgagor's right to redeem," say the Supreme Court of Maine, in *McPherson* v. *Hayward*, 81 *Me.* 336, "is "clearly defined by law, and one the court cannot *abridge or enlarge* "*by a single day.*"

In *Phinney* v. *Phinney*, 81 *Me.* 460, the same court said: "At "the time when this contract (the mortgage,) was made, the statute "law of the state provided specific modes by which the mortgagee "of real estate might foreclose his mortgage, and it specifically de- "fined the time in which the mortgagor might redeem. * That "time was a fixed and definite term of three years. * The rights "of the mortgagee were no less valuable to him than were those of "the mortgagor. If existing and secured to him, from the nature

"of the contract and the laws in force at the time of its execution, "those rights were as inviolable as were those of the mortgagor.

"While it is not intended to disturb the proper application of the "principle that a state to a certain extent and within proper bounds "may regulate the remedy, yet if by subsequent enactment it so "changes the nature and extent of existing remedies as materially "to impair the rights and interests of a party in a contract, this is "as much a violation of the compact as if it absolutely destroyed "his rights and interests."

Phinney v. *Phinney*, 81 *Me.* 460, 461.

And the Court held that "this mortgage, having been given long prior to the act of the legislature in question, must be governed by the law then existing both as to its redemption and foreclosure." Page 459. The act in question extended the time of redemption and was held void as impairing the obligation of the mortgage contract.

It would seem as if the "rights and interests of *the party in a contract*," (in the present cases at bar the trustees under the mortgage of July 1, 1871,) were pretty effectually impaired, when they are struck out of the contract, turned out of doors, and a foreclosure effected by other parties "*without the intervention of the trustees*, thus *simplifying the proceedings*," as the learned judge below calls it.

That the suit at law, the writ of entry upon the mortgage, could be changed to a bill in equity by subsequent legislation is not doubted, care being taken in its provisions not to make it more onerous to either party under the mortgage contract. But the foreclosure by *act in pais* was part of the mortgage contract itself, and no more subject to alteration, or change, by subsequent legislation, than the bonds themselves.

It is believed that this Court has never sanctioned a change, or alteration, in any *contract*; and no *material* change or alteration in any *remedy* existing at the time the contract was made.

Upon this branch of the case, the admissions of the learned Court below that the provisions of the mortgage relating to the foreclosure by *acts in pais* are part of the mortgage contract, "and the rights thereby secured to the bondholders could not be abridged or taken away by subsequent enactments" are important concessions; but it is added immediately after: "The remedy by foreclosure by the trustees, existing when the mortgage of 1871 was given, "has never been abridged or taken away." 88 Me., 91. But the gist of the whole judgment below is that they *were taken away* by *force of the subsequent enactments*, the instant the new corporation was formed *on Aug. 15, 1883*. They existed, confessedly, on *Aug. 14, 1883* in full force and strength. On *Aug. 16, 1883* they had passed to and vested in the "Somerset Railway," a new company with a new name; and the

mortgage of July 1, 1871 had become, *eo instanti, functus officio*, and void, and had "*ceased to be security for the bonds*" described in it; which bonds were declared by the Court to be fully paid, if the railroad property was of sufficient value; and the legal estate of the trustees a "dry trust, with no duties to perform, a cloud upon the title of the Somerset Railway," which, in the language of the Court, "the *trustees* must release and *transfer*."

According to this opinion and judgment, the provisions and stipulations of the mortgage relating to the foreclosure, which are admitted by the Court to be secured under the mortgage contract, "and could not be abridged or taken away," are completely set aside by force of subsequent legislation, against the protests of the trustees and of a large minority of the bondholders, $110,600 against $324,400,—and the minority forced into a new and hostile corporation not authorized by the terms of the mortgage, nor by any law existing when it was made, and compelled to surrender their bonds, which were first mortgage bonds, for stock in such new corporation.

The decision of this Court in *Knapp* v. *Western Vt. R. Co.*, 20 Wall., 117, would seem to be decisive of several of the questions raised in the cases at bar, and of the general question under these assignments of error.

"It is conceded on the argument, " said *Mr. Justice Davis*, in delivering the opinion of the Court, "that Knapp & Briggs (the "plaintiffs in error,) were trustees of a mortgage upon the property "of the Western Vermont Railroad to secure the bonds of the com- "pany, and that upon a *strict foreclosure of the mortgage their title* "*became absolute in trust for the bondholders.* After this they leased "the road to the defendants (the Troy & Boston R. Co.,) for a term "of years, and at the expiration of the lease brought their suit upon "the covenants of the lease. It would seem that they not only had "the right to sue, but that nobody else could sue. It is said, how- "ever that before the expiration of the lease, a new corporation, "called the Bennington & Rutland Railroad Company, was organized "by a majority of the bondholders of the defunct corporation under "the Laws of Vermont who had converted their bonds into stock, "and *that the new corporation* was, by the *provision of the statute* "under *which it was formed, substituted as trustee for the other bond-* "*holders in place of the plaintiffs in error*, and had thus become the "real party in this suit. It is not necessary to discuss the question "whether the statute of Vermont can bear the construction claimed "for it, for manifestly it is not in the power of the State legislature, "without the consent of the *cestuis que trust, to substitute a new* "*trustee in place of the persons named in the mortgage. This would* "*impair the obligation of the contract.* To change them is to change "the contract in an important particular, and this cannot be done "without the consent of the parties for whose benefit the trust was "created. The trustees in this case have not been discharged from

"the obligations of their trust, or divested of their right of action "on this lease by judicial proceeding or otherwise, nor has the trust "in fact been closed, for there are bonds outstanding which have nev- "er been paid, or converted into stock of the new corporation. It "can make no difference whether these bonds are few or many. The "trust is continued until all are paid, unless in the meantime the "trustees are discharged. They are the real plaintiffs in the suit "brought to enforce a claim accruing to them in the execution of "their trust, as much so as executors and administrators are, who "also sue for the benefit of others and not themselves. Like them "they control the litigation, and are charged with the responsibility "of conducting it."

The plaintiffs in error, in the present suits, most respectfully submit, that if the *names of the trustees* in a railroad mortgage cannot be changed by subsequent legislation, without impairing the obligation of the contract, it is difficult to see how the *title of the trustees* and *their right to the possession of the whole property*, can be so changed, without similar impairment.

And if, when a *regular foreclosure* according to the terms of the mortgage has taken place, the rights of such bondholders, whether few or many, as do not choose to go into a new corporation formed by other bondholders, are protected by this Court against all invasion until paid, *a fortiori*, it would seem that the rights of such bondholders after a *subsequent statute foreclosure, not authorized by the mortgage*, should at least be equally protected, from impairment which amounts to destruction.

Under the fifth and sixth errors assigned, the plaintiffs submit that certain implied contracts arise and exist between holders of the same class of bonds under the same mortgage. Each is bound to know the conditions, and special stipulations of the mortgage, and impliedly agrees to abide by and carry them out.

In the present mortgage the special stipulations relating to the foreclosure of the mortgage, in case the trustees should adjudicate that there had been a breach of the conditions, were binding upon each bondholder. There was an implied agreement that each should share equally in the income of the property if taken possession of by the trustees, and operated for the benefit of the bondholders; and that each should have his *aliquot part of the mortgaged property* under a foreclosure made in accordance with the provisions of the mortgage; and should have the right to become a member of a corporation formed in accordance with the provisions of the mortgage after foreclosure, if he wished to do so. There was an implied agreement that every bondholder should receive as much *pro rata* on his interest coupons, as they fell due, as every other bondholder, and no more; that nothing should be done by one bondholder to the prejudice of another, or inconsistent with the stipulations of the

mortgage upon which all are presumed to rely for their common security.

That the mode of forming a corporation by the bondholders under the provisions of the mortgage, in case of foreclosure as therein provided, is a contract right secured to every bondholder individually and all bondholders who may wish to avail themselves of it. And that the subsequent attempt of a part of the bondholders, whether a majority or not is immaterial, to get possession of the mortgaged property by forming a new corporation was not authorized by the provisions of the mortgage, but was in violation of them, and of the implied contract existing between themselves and the other bondholders; and that the learned Supreme Court of Maine erred in sustaining the validity of a *subsequent statute which attempted* to *authorize* such *violation* and *impairment.*

Gilfillan v. *Union Canal Co.*, 109 *U. S.* 403.
Canada Southern R. Co., v. *Gebhard*, 109 *U. S.* 534, 535
Hall v. *Sullivan*, 21 *Law Reporter*, 144, 145, 146, 147, 148.
McClelland v. *Norfolk R. Co.*, 110 *N. Y.* 478, 480.
Batchelder v. *Council Grove Water Co.*, 131 *N. Y.* 42, 45, 46, 47.
Pennock v. *Coe*, 23 *How.*, 117.

Under the seventh assigned error, the plaintiffs respectfully insist that the foreclosure of the mortgage of July 1, 1871, under the laws in force when it was executed, would have vested an *absolute legal title* in the trustees, and an *absolute equitable title* in the bondholders; and that *neither title* could be changed or taken away by force of subsequent legislation and made to vest in any corporation not organized, in accordance with the provisions and stipulations of the mortgage.

It would impair the obligation of the mortgage contract. Any *other* corporation would not be *the* corporation provided for in the mortgage.

People v. *Cook*, 110 *N. Y.* 449.
Hall v. *Sullivan*, 21 *Law Reporter*, 145.
Knapp v. *Railroad Co.*, 20 Wall. 117, 122.

After a foreclosure in accordance with the terms of the mortgage the trustees could be required to convey to a corporation composed of *all* the bondholders.

But they would violate the terms of their trust under the mortgage, if they should attempt to convey to a corporation composed of *one-half* of the bondholders, or of *a majority* of the bondholders. In either case it is not the corporation provided for by the mortgage. No law when the mortgage was made authorized any such conveyance. The majority bondholders were then powerless to force the minority "whether few or many" into a new corporation, and com-

pel them to surrender *first mortgage bonds* for *stock* in a *new* and *heavily encumbered corporation.*

Gillfillan v. *Union Canal Co.*, 109 *U. S.* 403.
Canada Southern R. Co. v. *Gebhard*, 109 *U. S.* 535 and 542.

The mortgage contract which was their protection then, remains their protection still, under the powerful shield of the supreme law of the land.

The rights of all the parties under the mortgage contract were then fixed, and no subsequent state legislation could change them.

To change would be to impair.

Green v. *Biddle*, 8 *Wheat.* 84, 85.
Planters' Bank v. *Sharp*, 6 *How.* 318, 327, 330.

In the case last cited the Court said: "The question to be con-"sidered in this case is, whether an act of the legislature of Missis-"sippi passed Feby. 21, 1840 impaired the obligation of any con-"tract previously entered into with the Planters Bank.

If it did, the clause in the Constitution of the United States "prohibiting a state from passing any such law, has been violated, "and the plaintiffs in error are entitled to judgment."

And the court held that the rights of parties to a contract are fixed and established by the laws existing when the contract is made; that subsequent legislation cannot impair it at all. That "it is not "a question of *degree*, or *manner*, or *cause*, but of encroaching in any "respect on its obligations, *dispensing with any of its force.*" And the Court held that the Act of the legislature of Mississippi prohibiting the Planters' Bank from indorsing and transferring its notes to third parties was void, although it did not interfere with the Bank's title to the notes or its right to collect and receive pay for them. Under the provisions of the mortgage of July, 1, 1871, the trustees, after a foreclosure in the manner there provided by law, were to convey, and by the terms of the mortgage *had covenanted to convey* to a corporation of *all* the bondholders, the railroad property.

No *other* corporation, however formed, would come within the terms of *their covenant;* and no court could lawfully require them to break their contract by conveying the property to such *other* corporation. Suppose such an attempt had been made by the majority of the bondholders during the first ten years after July 1, 1871? Would not every court have said that it would violate the provisions of the mortgage?

Is it any less a violation when attempted *under a statute*, two years later?

Yet that is precisely what the defendants in error in their bill in equity asked the Maine Supreme Court to do, and that is precisely what the Maine Supreme Court did—against the dissenting opinion

of *Mr. Justice Emery* and *Mr. Justice Whitehouse* who discuss one branch of the case with great clearness and ability—the right of the bondholders to the income of the road during the three years the mortgage foreclosure is running, which is taken away *eo instanti* under the Court's *statute foreclosure* of *Aug.* 15, 1883.

Under the mortgage-foreclosure, the bondholders become tenants in common of the railroad property, and as many as wish are entitled to become members of the corporation provided for by the mortgage. No one is obliged to become a member *nolens volens.*

Stratton v. *European and North Amer. R'y*, 74 *Me.* 424.
Same v. *Same*, 76 *Me.* 269, 273, 274.
Knapp v. *Railroad Co.*, 20 *Wall.* 117, 121, 123.

Bondholders who do not choose to become members, remain tenants in common with the new corporation and are entitled to their share of the income of the road and may sue for it at law, or bring their bill in equity.

Brooks v. Centr. Vt. R. Co., 22 *Fed. Rep.* 211.
Sage v. *Centr. Iowa R. Co.*, 99 *U. S.* 339.
Pratt v. *Munson*, 84 *N. Y.* 585.

Or must be paid in full or *pro rata* by those who choose to become members of the new corporation under the provisions of the mortgage.

Knapp v. *Railroad Co.*, 20 *Wall.* 117, 123.

All of these rights, secured to every bondholder under such a foreclosure as the mortgage provides, are radically different from those given to him under and by force of the subsequent legislation, in the "Somerset Railway," to which, by the decree of the court below, he must surrender his *first mortgage bonds*, which he supposed, when he purchased them, to constitute and carry with them the first security on the property, and take in place of them stock in a hostile corporation already encumbered, as the case shows, with $225,000 of new bonds. As already stated, in another branch of the case, the evidence shows the net income of the road to have been about $25,000 per year since 1887, of which $11,250 has been appropriated yearly to pay the interest on these last named bonds which should have been applied, as the plaintiffs in error believe and contend, to the payment of the interest upon the first mortgage bonds of July 1, 1871, falling due July 1, 1891.

It will be noticed that this yearly income during the three years the mortgage foreclosure would run, would be a valuable right indeed—nearly enough to pay the yearly interest upon all of the first mortgage bonds.

Eighth Error.

The provision of the mortgage which makes the trustees the *sole judges* in the first instance of a breach of the conditions, was an exceedingly important one. It qualified materially the preceding statement that "*any omission* of said company to pay any bonds or "coupons as they become due, or to perform any other engagement "herein contained to be performed, shall constitute a breach of the "conditions of this deed." The two sentences, like two parts of any contract, or statute, are to be construed together, giving each its proper effect taken in connection with the other parts of the same contract, and considering its general purposes and objects.

Haven v. *Grand Junc. R. Co.*, 4 *Allen*, 91.

The trustees are made sole judges whether there has been "*any omission.*" Nobody else is authorized to determine that fact. And without such determination and adjudication by the trustees, there could be no breach of the conditions, and consequently no foreclosure. It is easy to conceive of various contingencies in which the omission to pay the coupons or even bonds, when due, would not in fact be a breach of the conditions. If the road was in the hands of the trustees, they would be bound to apply the income to the payment of the interest until the bonds became due, and if more than enough to pay the accruing interest, the surplus must be applied as advance payment upon the principal. *Wood* v. *Goodwin*, 49 *Me.* 260.

Yet until the trustees settled their account, and the application was actually made, the interest would not appear to be paid. So if the trustees should refuse to take possession of the road, after being requested so to do by the bondholders, upon the ground that their personal responsibility and risk would be so great as to be hazardous—which is often done—see 2 Cook on Stockholders, etc., 3rd Ed. sec. 823, page 1315—and a receiver should be appointed. *Warner* v. *Rising Co.*, 3 *Woods*, 514.

In such cases there would be no breach of condition. So if one or more of the trustees should die, as was actually the fact in the cases at bar. there could be no breach, and no foreclosure until the vacancies were filled, and the trustees had so adjudicated. A majority of the trustees could do no act under the special terms of the mortgage, without the concurrence of, or notice to the other. *Anson, Pet.*, 85 *Me.* 88. And any party to the mortgage at any time was entitled to have such vacancies filled upon application to the court. 85 *Me.* 79. But the chief reason for conferring this special and peculiar power upon the trustees was to prevent a hasty or ill-advised foreclosure, and better for all parties to vest in the trustees the power to determine under all the circumstances when a foreclosure would, or would not be advisable; and also when it

would be wise and for the best interests of all parties to accept subsequent performance in case of a breach, rather than foreclose the mortgage. All these powers were expressly conferred upon the trustees by the special provisions and stipulations of Art. 3 and 4 of the mortgage. And the mortgage itself was something more than a mortgage—it created a trust as well. And "it is well settled," say the Supreme Court of Mass., in *Ellis* v. *Boston, Hartf. & Erie R. Co.*, 107 *Mass.* 12, in relation to a similar mortgage "that the person who creates the trust may mould it in whatever "form he pleases."

Every person who bought bonds or stocks was chargeable with knowledge of these provisions of the trust deed, and bound by them and no subsequent legislation could change them. And no legal foreclosure of this mortgage could be had except in strict conformity to these stipulations.

Batchalder v. *Council Grove Co.*, 131 *N. Y.*, 42, 46.

In this case the Court said: "By prescribing the effect which the "clause shall have on the contract, and *the particular manner* in "*which a default* in *the payment* of *interest* shall *be availed* of, it "*impliedly excludes all other methods*, and *confines the bondholders* "to the *remedies expressly authorized.*"

In *Clelland* v. *Norfolk R. Co.*, 110 *N. Y.*, 479, the Court said: "Not only the obligor, but each bond and coupon holder is "interested in the exercise of the powers referred to, and has the "right to insist that the conditions of its exercise provided by the "contract, so far as they are material, *shall be fully* and *exactly com-* "*plied with.*

"Any other construction would place the rights of a minority at "the discretion or caprice of a majority, and leave it practically "powerless to avail itself of the security provided for it by the "plain language of the contract."

In *Ellis* v. *Boston, Hartf & Erie R. Co.*, 107 *Mass.*, 34, the Court said: "The trustees are not officers of the Court, and do not act "under its direction. They stand upon their own rights as "mortgagees. *For the extent* and *measure of those rights, the* "*instrument of mortgage* is *the guide.*" See also 107 Mass., p. 36 and 37.

In *Green* v. *Biddle*, 8 *Wheat*, 84, this Court said: "The objection "to a law on the ground of its impairing the obligation of a con- "tract, can never depend upon the extent of the change which the "law effects in it. *Any deviation from its terms* by postponing or "accelerating the period of performance which it prescribes, "imposing conditions not expressed in the contract, or *dispensing* "*with the performance of those which are*, however minute, or "apparently immaterial in their effect upon the contract of the "parties, impairs its obligation."

More than forty years afterwards this Court quotes this entire sentence and reaffirms its soundness. *Von Hoffman* v. *City of Quincy*, 4 *Wall*, 552, 553.

And yet in the opinion of the learned Supreme Court of Maine, although these special provisions in the mortgage of July 1, 1871, *relating to the foreclosure*, are expressly admitted to be part of the mortgage contract, and cannot be abridged or taken away, this very case of *Hoffman* v. *City of Quincy* is quoted as authority for sweeping them all away in a single day by force of subsequent legislation.

The admissions by the Court that all of these provisions of the mortgage as to the manner of effecting a foreclosure, are part of the mortgage contract and can not be abridged or taken away, are in accordance with many other decisions of the same Court, and of all the courts of the country.

Phinney v. *Phinney*, 81., *Me.*, 450, 464, 466.
Me. Pherson v. *Hayward*, 81 *Me.*, 336.

What is a *foreclosure?* What is its purpose and object? To cut off the mortgagor's right to redeem, secured to him under and by the contract and laws existing when the contract was made.

It *can be cut off only* in the *manner provided by the contract.* It cannot be shortened a day by the court or by any subsequent statute.

Cases Supra.

Nor can the rights of the mortgagee be affected by any subsequent act of the mortgagor, or those claiming under him.

Toledo R. Co. v. *Hamilton*, 134 U. S., 299, 300.
George v. *Wood*, 9 *Allen*, 84.

Nor can this right be shortened or lengthened a day by subsequent legislation.

Phinney v. *Phinney*, *supra.*

The admissions of the learned court below, and their *previous* and *subsequent* decisions, are fatal to the validity of their judgment in the cases at bar. If the rights of the mortgagee and of the mortgagor are fixed by the mortgage contract; if the *mortgagee* is entitled to the possession and income of the road while the three years of the impending foreclosure are running; and if the *mortgagor* is entitled to the *last day* of *his three years* to redeem, how can all of these rights, or any of them be changed, and cut off by *subsequent legislation in a single day*, under the guise of a *change of remedy?* And how can a *subsequent statute* actually change and "transfer" the *title* and the *property* from *the trustees* and the *cestuis que trust, eo instanti*, to third persons, "*without the intervention* "of *the trustees*, thus simplifying the proceedings?" The plaintiffs in error deny it.

No better answer to the whole opinion of the learned court below,

including its favorable comments upon the attempted foreclosure by bill in equity, than is to be found in the opinion and judgment of the same learned Court six years previously in the case already cited. *Phinney* v. *Phinney*, 81 Me., 466.

In the opinion delivered by Mr. Justice Foster, a learned, able and careful judge, it is said: "It will be noticed that in these "decisions (referring to cases in Wisconsin and Iowa and Conn.,) "the foreclosure was under proceedings in equity where the Court "of Chancery was authorized to decree foreclosure,—a *proceeding* "*which has never existed in this State. K. & P. R. R. Co.* v. *P. & "R. R. Co.*, 59 *Me.*, 31.

"As we have remarked, foreclosure in one of the modes provided "by law is fixed by positive statute enactments, and does not "depend upon any decree of the chancellor. It is not subject to "that decree of flexibility, both as to time and process, which exists "in jurisdictions where foreclosure proceedings are relegated to "courts of equity. The remedies there are more elastic than under "a system where the time of redemption is known and understood "to be for a fixed and definite term. So long as we maintain that "the remedy furnished by the laws at the time the contract is "entered into, constitutes a part of the obligation, (*Walker* v. "*Whitehead*, 16 *Wall*, 314,) so long must we see that it is not "materially impaired by any disguise of remedial legislation. *The* "*doctrine of remedy must not affect the doctrine af rights.*

"The act (of the legislature,) in question," he continues, "abrogates a right which the defendant had as mortgagee, at the "time the mortgage was given, of a fixed and definite period for "the foreclosure of the mortgagor's equity." And the act was pronounced void.

The same doctrine established by the Supreme Court of Mass., in a late decision, *Hallowell* v. *Ames*, 165 *Mass.*, 124, 125.

While in the opinion of the learned court below in the present cases, the *contract* rights of *the trustees*, and of the *cestuis que trust*, and of the *mortgagors*, are allowed to be swept away by a single stroke of subsequent legislation, the same learned judge in delivering the opinion of the same court in a subsequent case in the same volume of reports, holds that a *right* secured by a *statute*, (an attachment of property upon a writ,) cannot be taken away, by a *subsequent statute*, because it would impair the obligation of the contract in the suit upon which the attachment was made.

Peabody v. *Stetson*, 88 *Me.*, 281.

In a still later case the same court said: "*No legislative act can "make invalid a provision* in an *existing contract otherwise valid.*"

Kimball v. *Accident Asso.*, 90 *Me.*, 185.

If the principles announced in *Phinney* v. *Phinney*, 81 *Me.*, 466, in *Mc. Pherson* v. *Hayward*, 81 *Me.*, 386, in *Anson et als.*, *Pet.*, 85 *Me.*, 76 and in *Peabody* v. *Stetson*, 88 *Me.*, 281, are sound, it is not

easy to see how the doctrine and reasoning of the court in the cases at bar 88 *Me.*, 86 and 101, can be supported. The two decisions of the Court *upon the same facts*, 85 *Me.*, 79, and 88 *Me.*, 86, are directly contrary to each other. *One must be unsound law.* If we look at the great leading cases in the Supreme Court of the United States, for light, *Bronson* v. *Kinzie*, 1 *How.*, 311, and *Brine* v. *Insurance Co.*, 96, *U. S.*, 627, the solution of the question would not seem to be difficult.

If we look also at the decisions in the courts of other States, the result is the same.

Weeks v. *Boynton*, 37 *Vermont*, 297, is a *striking case directly in point.*

In *Randolph* v. *Middleton*, 26 *N. J. Eq.*, 543, where the mortgage provided that upon the default of interest the principal of all the bonds should, at the election of the trustees, become immediately due and payable, and the trustees had not so elected, the subsequent foreclosure proceedings and sale upon the petition of others besides the trustees, were held void; and *a statute passed* after *the mortgage was given authorizing such foreclosure and sale* was *held invalid* as *imparing the obligation* of the *mortgage contract.*

The plaintiffs in error respectfully submit that the learned Supreme Court of Maine, while admitting that the provisions and stipulations of the mortgage, and of the law existing when it was made relating to the foreclosure of the mortgage, were part of the mortgage contract, erred in not giving them any effect. and in holding that they could be taken away and annulled by a subsequent statute. And they further submit that these provisions and stipulations provided the only mode by which a legal foreclosure of the mortgage could be had, and that the learned Supreme Court of Maine erred in not holding the subsequent legislation void as impairing the obligation of the mortgage contract; and that instead of sustaining the bill in equity of the defendants in error, whose only title to the property was confessedly given them by such subsequent statute, they should have dismissed it.

Under the ninth assigned error, the plaintiffs respectfully refer to the considerations and authorities already called to the attention of the Court.

They suggest that the decision of the Court in *Knapp* v. *Railroad Co.*, 20 *Wall.* 117, in principle covers the present cases. It is true that, in that case, these was a legal, and not a statute-foreclosure, but in all other respects the cases seem to be substantially alike in principle. The encroachment upon the mortgage by subsequent legislation which the Court in that case condemned as impairing the mortgage contract, was in transferring the *names* of the trustees *to a new corporation;* while in the cases at bar, the *property* of the trustees is thus transferred *to a new corporation.* And no reason is

perceived why it could not in the same way be transferred to a natural person, or several of them, if such had been the will of the legislature. In the present cases, the *statute-foreclosure* was held by the learned Court below to change *first mortgage bonds into stock* of a new and hostile corporation, not authorized by, but wholly inconsistent with, and in entire disregard of, the provisions of the mortgage, and of course subjected them to an issue of bonds by the new corporation for $225,000.

The remarks of the learned judge on pages 92 and 93 that "it is "too late for the trustees, or dissenting bondholders, now to object "to technical irregularities if any exist; especially as the Somerset "Railway has since extended the railroad from North Anson to "Bingham a distance of about sixteen miles, built a branch road of "one mile, etc., and placed a mortgage of $225,000 upon the road, "etc. Their long acquiescence without objection, coupled with the "changed conditions and relations *resulting from the possession and* "*management* of the *property by the Somerset Railway*, estops them "from now questioning the legality of the organization of the new "corporation,"—these statements, under the circumstances, were simply *dicta*. If the statute-foreclosure was valid—if, as he had already announced, the entire equitable title of all the bondholders under the mortgage of July 1, 1871, was transferred, by force of it, to, and vested in, the new corporation on Aug. 15, 1883, leaving nothing but a "*dry trust*" in the trustees, which they were required in this same opinion to release and convey to the new corporation, then a good title was acquired by the new corporation, and no subsequent *laches* by any body could affect it. If, on the other hand, as the plaintiffs in error, the trustees under the original mortgage contend, the whole proceedings under the subsequent statute were a nullity because impairing the obligation of the mortgage contract then no laches could exist on the part of the trustees or bondholders who relied, and had a right to rely, upon the protection afforded them by the supreme law of the land. Their mortgage was duly recorded which was notice to all the world of their rights.

Toledo R. Co. v. *Hamilton*, 134 *U. S.* 299.
Jordan v. *Cheney*, 74 *Me.*, 361.

A void title, originating under void legislation could never ripen into any validity as against such recorded mortgage and the rights secured by it. The party who proposed to purchase the bonds of the new corporation was bound to inquire into its authority to issue them. His inquiry would at once lead him to their records, and to the law under which it professed to be formed, and he would at once learn that it was formed by part of the bondholders under the mortgage of July 1, 1871, but not in accordance with the provisions of the mortgage. He examines the records and finds that no foreclosure of it has ever been made by the trustees, who, by its express provisions, are made *sole judges* of a breach of its conditions. He finds no notice of foreclosure recorded in the county registries. He finds the bonds under the mortgage not yet due by several years.

He learns from the record of the mortgage and from the law in force when it was made, which he is bound to take notice of, that a majority of the bondholders had no power, either with, or without a foreclosure, to form a new corporation, and force the minority into it, so as to give the new bonds of the new corporation precedence over the *first mortgage* bonds. And he would be bound to know, whether lawyer or layman, that no subsequent statute could change this mortgage contract, and transfer the title created by it to new trustees who sign the new bonds, or to the new corporation.

He would also learn, upon inquiring for the trustees under the first mortgage, thinking perhaps that they could tell him better than anybody else what the actual situation was, that one of the trustees died more than three years before any attempt to issue the new bonds; and that as the remaining trustees, by the express provisions of the mortgage, could do no act whatever relating to the mortgaged property, the rights of all parties were in abeyance until the vacancies were filled. He could learn that the same majority of bondholders could, at any time during said three years, have caused the vacancy in the board of trustees to be filled, and that their delay in doing so placed them upon exactly the same level with the minority neither gaining any lawful advantage over the other. He would therefore learn abundantly enough to put him upon his guard, and charge him with full notice of the actual situation, and of the invalidity of the new bonds.

And if some bondholder under the mortgage of July 1, 1871, of the hundreds scattered over the state and through New England and Canada, surprised because he failed to receive his interest when due, made similar inquiries, he would obtain the same information, and would feel himself amply protected by the record of his mortgage, and by his belief that his *quasi* partners, the other bondholders could do him no harm, and must be accountable to him upon settlement of the income of the road; and that eventually like nearly all other railroad investments in Maine, this one in the end, might prove to be safe and profitable. He had a right to rely upon the implied agreement between the other bondholders and himself, that nothing should be done to his prejudice. His bonds were not due, and would not be for years to come. He had a right to rely upon the stipulations in his mortgage that there could be no foreclosure of it until the trustees had decided that there had been a breach of its conditions, and deemed a foreclosure advisable; or had been asked by at least one-third of the bondholders to foreclose it.

He had a right also to rely upon the right secured to him under the mortgage of becoming a member of a corporation owning all of the mortgaged property in case of a legal foreclosure under its provisions. He understood the law of Maine to be that his mortgage being duly recorded, nothing could affect it but payment, or the statute of limitations.

Parkhurst v. *Cummings*, 56 *Me.* 159.
Bunker v. *Barrow*, 79 *Me.* 52.

The plaintiffs therefore respectfully submit that the remarks of the learned judge below suggesting laches on the part of the trustees or minority bondholders were simply *dicta*. His decision would have been just the same, had all these remarks been left out of the opinion. The new corporation, the "Somerset Railway," acquired a valid title to the railroad property, *eo instanti*, on its organization under the statute of March 6, 1883, or *it never did*. If it did, no laches could make it any better.

If it did not, no laches could make a valid title out of a void statute—a nullity. With all the due deference to the learned Supreme Court of Maine, and to the learned and able judge who prepared its opinion in the cases under consideration, the plaintiffs in error submit with great confidence that from the very nature of the situation there *could* be no laches on the part of anybody. Each party stood upon what it claimed to be its legal rights, the trustees and minority bondholders upon their *mortgage contract*; the majority bondholders, the defendants in error, upon *their statute*.

In the vote of the latter on *May* 11, 1887, *to complete the organization of the new corporation after procuring the passage of the act of April* 11, 1887, is the following recital: "Whereas the mortgage "given to secure bonds on which this corporation was formed dated "the first day of July, A. D. 1871, was by a decree of the Supreme "Judicial Court of the state upon due proceedings thereon, finally "foreclosed on the first day of April, A. D. 1887. And whereas "under the *statute* in such case made and provided such foreclosure "inured for the benefit of this corporation." (Record, page 58.)

This is the exact language of the act, the passage of which they had procured just one month before.

And this is the exact language of Par. 10 in the present bill in equity of the defendants in error. (Record, p. 12.) And as no other amendatory or additional act had been passed by any legislature *after the act of* 1883 *until the act of April* 11, 1887, no other could have been intended, or referred to.

Here was a square declaration that the majority bondholders claimed that the mortgage had been foreclosed, and that *title under the foreclosure had vested by statute in the new corporation*, which was *themselves*. They asked no favors of the minority—extended no invitation to them at any time, and did not intend to. The whole proceeding was got up to get rid of them. If they had wanted an honest and fair reorganization for the benefit of *all* the bondholders, the mortgage provided how it could be had through the trustees; and the Dunns and Ayer controlled more than enough bonds to *compel* a foreclosure *through the trustees*.

If now we look to see *who claims laches*, we shall find these same parties, who so defiantly claimed title to the whole property immediately after the statute of April 11, 1887.

If we look at their bill in equity filed to obtain the foreclosure under their act of March 6, 1883, we shall find a statement in it *under oath* that *in the year* 1875, only $920.50 of interest coupons was paid in all on the first mortgage bonds; (Record, p. 82,) while the treasurer of the Somerset Railroad Co., their own clerk and bookkeeper, testifies that he paid to them, and they received, (Dunn, and the Dunn Edge Tool Co.,) $7,186.00 of interest coupons, (Record, p. 125,) without the knowledge, so far as appears, of any other bondholders. (Record, p. 9.)

When we note that these men at the time were all officers of the Somerset Railroad Company, John Ayer its president, A. R. Small its treasurer, Reuben B. Dunn and R. Wesley Dunn, directors, men who were *quasi trustees*, who owed a duty to protect the road to the extent of their power, and to save it from foreclosure if possible, and who were forbidden by law, and by every moral sense to depreciate its credit, or its bonds, or even to purchase them *at a discount*:—

Wardwell v. *Union Railway Co.*, 103 *U. S.* 651.
Duncomb v. *N. Y. Housatonic & Northern R. Co.*, 84 *N. Y.* 190.
Drury v. *Cross*, 7 *Wall.*, 302.

When we take into account that these were the *only* men who filed the bill in equity in 1883 to *foreclose the very mortgage which it was their duty to protect from foreclosure*, we might well expect the cry of laches.

The running rogue is always the party who cries "Stop thief." That there was no laches and in the nature of things could be none, was distinctly held by the Maine Supreme Court in its *first decision*, when, after full argument, upon the same facts, and upon every ground now urged in the present suits, it decided to appoint trustees to enforce the mortgage for the benefit at least of $58,000.00 of the bonds, and of as many more as should ultimately be found, under the proceedings of the trustees, to be entitled to its security. *Anson et als., Pet.*, 85 *Me.*, 87.

And it is supposed that this Court will exercise its own judgment npon a question of laches, especially when connected with Federal questions.

If a State Court, by a suggestion of laches, could deprive a party of the right secured to him under the Federal Constitution, such right would many times be valueless.

Planters' Bank v. *Sharp*, 6 *How.*, 326, 327.
Scott v. *McNeal*, 154 *U. S.* 45.

In closing this argument under the errors assigned, the plaintiffs desire to call the attention of the Court to the opinion of the Court below in No. 185, reported in 88 *Me. R.*, 102 *and* 103.

The same learned judge held that the new corporation, the

Somerset Railway, by force of the subsequent legislation in 1883, had acquired the rights of the mortgagees and trustees under the mortgage of July 1, 1871, without foreclosure, so that the trustees could sustain no action to recover the property. He admits the prior title of the trustees under the mortgage contract of July 1, 1871, and holds that it was divested and transferred tc the Somerset Railway by force of the statute passed twelve years afterwards. He refers to his opinion in the previous case for the discussion of the rights of the parties. In that opinion he holds that without any act of the trustees, and without foreclosure of the mortgage a subsequent statute has deprived them and the *cestuis que trust* under them, of the property and right of possession; thus stating again the same Federal question which underlies the whole case.

And the plaintiffs in error close this argument by saying as in its commencement, that they are unable to find any case like it. From *Bronson* v. *Kinzie*, 1 *How.*, 311 down to *Barnitz* v. *Beverly*, 163 *U. S.* 118, they find many statutes of the States extending, or changing, some right, or provision, or stipulation of a mortgage contract, or other contract, upon all of which this Court has steadily set its seal of disapproval. But the cases at bar are the only ones found in which a subsequent statute has *attempted* to take away the *whole right or title created* by a *previous contract*.

D. D. STEWART,
H. B. CLEAVES,
of Counsel for Plaintiffs in error.

DISSENTING OPINION BY MR. JUSTICE EMERY, CONCURRED IN BY MR. JUSTICE WHITEHOUSE.

This controversy seems to be exclusively between two sections of the first mortgage bondholders under the Somerset Railroad Company mortgage of 1871. The trustees are mere dummies. The original Railroad Company does not care.

The controversy is on the rights of the individual bondholders.

At the time the bonds and mortgage were executed and delivered in 1871, the rights of each individual bondholder(in case of default) by the terms of the mortgage and statute were substantially as follows: He could require the trustees to call a meeting of the bondholders. At such meeting a majority of the bondholders present could determine whether the trustees should take possession of the road and operate it for the benefit of the bondholders. (The alternative would probably be a receiver.) In such event the net earnings of the road, if any, went direct to the bondholders. There was no power to extend the road, or saddle it with new mortgages. The individual bondholders were entitled to the earnings of the road as it was.

One-third of the bondholders could require the trustees to foreclose the mortgage in the manner named in the statute. When this was done, and the statute foreclosure completed, then and not till then the holders of the bonds and coupons became *ipso facto* a corporation, entitled to a conveyance from the trustees, and empowered to all the powers of the original railroad corporation. Of course this new corporation could by legislative authority give a new first mortgage and delay its stockholders, the original bondholders behind the new bonds. Until such statute foreclosure however, there could be no new corporation, no new mortgage. Each bondholder was interested as tenant in common, entitled to his *pro rata* share of the earnings, and not liable to have this right postponed to new bonds without his consent. *Brooks* v. *Vt. Cent. R. R. Co.*, 22 *Fed. Rep.* 211, 11. After the mortgage and the bonds of 1871 had been issued and purchased, and the rights of the holders had become fixed, the legislature in 1876 and 1878 provided that the bondholders under railroad mortgages might become a corporation at any time after default, when more than one-half should so elect in writing. A majority of the bondholders could at once after default turn all the bondholders into stockholders without any action by the trustees whatever when the majority so determined this could be done, and then as majority stockholders could require of the trustees a conveyance of their interest in the property. They could then with legislative authority make new mortgages and bonds

and place them ahead of the rights of the original bondholders now become stockholders. Provision was also made for other modes of foreclosing the original mortgage in other ways than those provided in the statute of 1871.

The difference between the original and subsequent legislation seems to be this. Under the original the bondholder was not liable to come under the yoke of the majority in a new corporation until after a foreclosure had been completed by the trustees in the statute mode. Until that moment he retained his separate individual rights as a bondholder to his *pro rata* share of the earnings. This time would be at least three years. Under the subsequent legislation, the bondholder was liable to come under the yoke of the majority at once after default without any foreclosure and be postponed to new mortgages and bonds.

When the default upon these bonds occurred no steps were taken by any bondholder nor by the trustees under the law of 1871, in force at the time of the issue. Instead of those steps a majority of the bondholders proceeded under the subsequent statutes. They elected in writing to form a new corporation, and did form one (if they legally could). This new corporation did not procure any conveyance of the property from the trustees, but ignored them and itself took possession of the road and operated it, foreclosed the mortgage in the new modes, and have assumed to make a new mortgage and bonds to be a first lien on the property.

A part, a minority of the bondholders held aloof from these proceedings and now resist this bill on the ground that their rights were fixed by the mortgage and statute of 1871, and were not and could not be changed without their consent by the subsequent legislation and proceedings under it. They insist that until a completion of the foreclosure by the trustees, the possession of the road should be held by the trustees, and the net earnings of the original road belongs to the individual bondholders and cannot be sunk in any new mortgage. They insist that only a new corporation formed after a foreclosure by the trustees can subject the property of the bondholders to new incrumbrances.

The decisive question seems to be whether the subsequent legislation binds the unwilling or non-assenting bondholders. It is a Federal question which probably will finally go to the U. S. Supreme Court.

I do not think the cases cited in the opinion as to the constitutionalty of a change of remedy apply. This is not a question of remedy between obligees and obligors. It is a question of right between individual bondholders. Under the statute of 1871 a bondholder could remain such until after a full statute foreclosure by the trustees, only then did he change into a stockholder liable to have a new lien or mortgage super-imposed against his will upon his interests in the property. Under the subsequent legislation he could be changed into a stockholder at once after default against his consent, and be made to submit to a new and superior lien upon his property.

The rights and situation of the individual first mortgage bondholder are plainly different from those of the individual stockholder. Any legislation that assumes to turn the rights of a first mortgage bondholder into those of a stockholder before the time appointed in the bond, mortgage and original statute seems to assume to effect a change in rights, as well as in remedies.

In *Green* v. *Biddle & Wheat.* 1, it was stated broadly that any statute postponing or accelerating a date named in a contract or imposing or dispensing with conditions, however apparently immaterial, impairs the obligations of the contract.

In *Gilfillan* v. *Union Canal Company.* 109 *U. S.* 401, it was said that each bondholder under such a mortgage as this "enters by fair implication into certain contract relations with his associates." In that case the subsequent statute did not assume to bind unwilling bondholders, but enacted that such bondholders as did not express dissent after being notified, should be held to assent. The court held that the requirement of an expression of dissent upon request did not impair the obligation of the contract between the bondholders.

In *Canada Southern R. R. Co.* v. *Gebhard, U. S.* 109, 537, the subsequent statute authorizing a different plan of re-organization was enacted by the Canadian Parliament for a Canadian road. The Court held the constitutional restraint against legislation impairing the obligation of contracts did not affect Canadian legislation. The majority opinion seems to intimate and the dissenting opinion of Justice Harlan almost declares that subsequent legislation by the states of the Union changing the mode or time of re-organization would be void against any non-assenting bondholder.

In *Hollister* v. *Stewart,* 111 *N. Y.* 644, there was an effort to organize the bondholders into a corporation earlier and in a different way from that prescribed in the mortgage. The Court used vigorous language in declaring that each bondholder's rights were fixed and could not be varied without his consent. Though no subsequent statute was involved, the language of the Court would indicate that such a statute could have no force.

It is familiar law that where the right to amend, etc., the charter of a corporation has not been reserved by the legislature, no subsequent legislation can bind a stockholder to any change in the charter not originally within the power of the corporation itself to make. In other words in the absence of such reserved power the legislature cannot increase the power of the corporation as against its stockholders, cannot increase the power of the majority over the minority. *Lowenthal* v. *Rubber Co.* 28 *At. R.* 454 (N. J. Eq.) citing the Maine cases in 77 and 79 Me. of the Belfast Railroad Company. Under this principle can the legislature change the rights of bondholders or increase the power of the majority of them over the minority?

The opinion of our Court in *Phinney* v. *Phinney,* 81 *Me.* 450, has set the tune pitch well up in defending contract and statute

rights against subsequent legislation. It is very comprehensive in scope.

The opinion in this case at bar seems to rely much upon the laches of the minority bondholders. Laches I understand to be an equitable defence to an effort to secure equitable relief. A defendant in an equity suit may interpose the laches of the plaintiff. In the short time at my disposal I have not found a case where the laches of a defendant have been held to be a ground for a bill in equity against him. I have not found that laches is a defense to a suit at law. Estoppel and the statute of limitations are common defenses to such suits, but laches never as I remember. Laches is invoked in equity only, and there by the defendant against the plaintiff. Here the defendants are not seeking equitable relief. They are only insisting on their rights enforceable at law; rights which if they ever had them they can be barred of only by release, estoppel or the statute of limitations.

But are they guility of laches? We have already lately adjudicated that there was a subsisting trust requiring trustees. We have lately sustained a bill by those same minority bondholders for the appointment of trustees to fill vacancies and keep the trust alive.

Should we have granted them this relief if they had been guilty of laches? If they had forfeited by laches their rights under the trust? If they were no longer bondholders with rights as such, but had become absorbed in the new corporation?

Was not the time they came into equity praying for a recognition of their status as bondholders the time to declare them guilty of laches? Have we not gone too far in advance to get behind the tree of laches.

But what have the minority done? Have they done more than simply rest on their rights under the mortgage and statute of 1871? They have never been put to any election as in Gilfillan's case, 109 U. S. 401. They have never consented, at least some of them have not.

What were they bound to do? Anything more than was named in the mortgage and statute of 1871? There is nothing in either requiring them to do anything. They could lie supine if they preferred, and let the old company continue to operate the road. No mortgagee, nor mortgage bondholder is bound to do anything not named in bond mortgage or statute.

It does not appear that all the bondholders knew what was being done by the majority under the subsequent legislation. Until that does appear they cannot be estopped. But suppose all did know? Was any duty thereby imposed on them? A part of their number were essaying to form a corporation at an earlier date, and in a different way from that named in the contract. Were those who did not take part in this attempt under any duty about it? In Gilfillan's case they were asked to say "yes" or "no" to it, but no such question was asked them here. Upon their non-appearance at the meeting for organization they were ignored and the proceedings

went on without them. Were they bound to "holler" to save their rights? Could they not rest on their mortgage and statute and rest quietly until they found it for their interest to move?

What is the use of contracts, statutes and constitutions, if the citizen is to forfeit his rights by holding his tongue and minding his own business, for any time short of the statute of limitations?

I have a notion that the U. S. Supreme Court when this case goes to them, will say that the rights of the individual bondholders under the mortgage of 1871 have not been lost by any laches, and cannot be changed by the subsequent legislation; that they have rights as bondholders still, and that the trustees are trustees for them as well as for the new corporation.

CHAPTER 465.

AN ACT TO INCORPORATE THE SOMERSET RAILROAD COMPANY.

Be it enacted by the Senate and House of Representatives in Legislature assembled as follows:

SECT. 1. George C. Getchell, William R. Flint, Franklin Smith, S. W. Hapgood, Bradbury T. Dinsmore, O. R. Bachelder, Edmund Coolidge, Thaddeus Boothby, Edgar Hilton, Benjamin Hilton, Jonas M. Hilton, Nathan Wood, Nathan Weston, Rufus Bixby, John S. Abbott, Dennis Moore, David Danforth, Edmund Rowe, Stephen D. Lindsey, their associates, successors and assigns, are hereby made and constituted a body politic and corporate, by the name of the Somerset Railroad Company, and by that name may sue and be sued, plead and be impleaded, and shall have and enjoy all proper remedies at law and in equity to secure and protect them in the exercise and use of the rights and privileges, and in the performance of the duties hereinafter granted and enjoined; and to prevent all invasions thereof or interruptions in exercising and performing the same. And the said corporation are hereby authorized and empowered to locate, construct and finally complete, alter, keep in repair, a railroad with one or more sets of rails or tracks, with all suitable bridges, tunnels, viaducts, turnouts, culverts, drains, and all other necessary appendages, from some point in the County of Somerset, at or near Caritunk Falls, on either side of the Kennebec River; thence down the valley of the Kennebec River through either of the towns adjacent to said river, passing through the villages in the towns of Anson and Norridgewock, and through Fairfield to the town of Waterville, in the county of Kennebec, with the right to connect with the Androscoggin and Kennebec or Somerset and Kennebec Railroads in the town of Waterville. And said corporation shall be and hereby are invested with all the powers, privileges and immunities, which are or may be necessary to carry into effect the purposes and objects of this act as herein

set forth. And for this purpose, said corporation shall have the right to purchase or to take and hold so much of the land and other real estate of private persons and corporations as may be necessary for the location, construction, and convenient operation of said railroad; and they shall also have the right to take, remove and use, for the construction and repair of said railroad and appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken; provided however, that said land so taken, shall not exceed six rods in width, except where greater width is necessary for the purposes of excavation or embankment; and provided, also, that in all cases said corporation shall pay for such lands, estate or materials so taken and used, such price as they and the owner or respective owners thereof may mutually agree on; and in case said parties shall not otherwise agree, then said corporation shall pay such damages as shall be ascertained and determined by the county commissioners for the county where such land or other property may be situated, in the same manner and under the same conditions and limitations as are by law provided in the case of damages by the laying out of highways. And the land so taken by said corporation shall be held as lands taken and appropriated for highways. And no application to said commissioners to estimate said damages shall be sustained, unless made within three years from time of taking such land or other property; and in case such railroad shall pass through any wood lands or forests, the said company shall have a right to fell or remove any trees standing therein, within four rods of such road which by their liability to be blown down or from their natural falling, might obstruct or impair said railroad, by paying a just compensation therefor, to be recovered in the same manner as provided for the recovery of other damages in this act.

SECT. 2. The capital stock of said corporation shall consist of not less than one thousand nor more than six thousand shares, and the immediate government and direction of the affairs of said corporation shall be vested in nine, eleven or thirteen directors who shall be chosen by the members of said corporation in the manner hereinafter provided, and shall hold their office until others shall have been duly elected and qualified to take their place, a majority of whom shall form a quorum for the transaction of business, and they shall elect one of their members to be president of the corporation and shall have authority to choose a clerk who shall be sworn to the faithful discharge of his duty; and a treasurer who shall be sworn and also give bonds to the corporation with sureties to the satisfaction of the directors in the sum not less than ten thousand dollars for the faithful discharge of his trust.

And for the purpose of receiving subscription to the said stock, books shall be opened under the direction of the persons named in the first section of this act at such time as they may determine in the towns of Solon, Anson, Madison, and Norridgewock and elsewhere as they shall appoint to remain open for five successive days at least, of which time and place of subscription public notice shall

be given in one or more of the newspapers printed in the county of Somerset, ten days before the opening of such subscription. And any seven of the persons named in the first section of this act are hereby authorized to call the first meeting of said corporation for the choice of directors and organization, by giving notice in one or more newspapers published as above named, of the time and place and the purposes of such meeting at least fourteen days before the time mentioned in such notice.

SECT. 3. When said corporation shall take any land or other estate as aforesaid of any infant, person non compos mentis, or feme covert whose husband is under guardianship, the guardian of such infant or person non compos mentis and such feme covert with the guardian of her husband shall have full power and authority to agree and settle with said corporation for damages or claims for damages by reason of taking such land and estate as aforesaid and give good and valid releases and discharges therefor.

SECT. 4. The president and directors for the time being are hereby authorized and empowered by themselves or their agents to exercise all the powers herein granted to the corporation for the purpose of locating, constructing and completing said railroad and for the transportation of persons, goods and property of all descriptions and all such powers and authority for the management of the affairs of the corporation as may be necessary and proper to carry into effect the objects of this grant, to purchase and hold land, materials, engines and cars, and other necessary things in the name of the corporation for the use of said road, and for the transportation of persons, goods and property of all descriptions; to make such equal assessment from time to time on all the shares in said corporation as they may deem expedient and necessary in the execution and progress of the work, and direct the same to be paid to the treasurer of the corporation. And the treasurer shall give notice of all such assessments; and in case any subscriber or stockholder shall neglect to pay any assessment on his share or shares for the space of thirty days after such notice is given as shall be prescribed by the by-laws of said corporation, the directors may order the treasurer to sell such share or shares at public auction, after giving such notice as may be prescribed as aforesaid, to the highest bidder, and the same shall be transferred to the purchaser, and such delinquent subscriber or stockholder shall be held accountable to the corporation for the balance if his share or shares shall sell for less than the assessments due thereon, with the interest and costs of sale, and shall be entitled to the overplus, if his share or shares shall sell for more than the assessments due with interest and costs of sale; provided however, that no assessment shall be laid upon any shares in said corporation of a greater amount in the whole than one hundred dollars.

SECT. 5. A toll is hereby granted and established, for the sole benefit of said corporation, upon all passengers and property of all descriptions which may be conveyed or transported by them upon said road at such rate as may be agreed upon and established from

time to time by the directors of said corporation. The transportation of persons and property, the construction of wheels, the form of cars and carriages, the weights of loads, and all other matters and things in relation to said road, shall be in conformity with such rules, regulations and provisions as the directors shall from time to time prescribe and direct.

SECT. 6. The legislature may authorize any other company or companies to connect any other railroad or railroads with the railroad of said corporation at any point on the route of said railroad. And said corporation shall receive and transport all persons, goods and property of all descriptions which may be carried and transported to the railroad of said corporation on such other railroads as may be hereafter authorized to be connected therewith, at the same rates of toll and freight as may be prescribed by said corporation, so that the rates of freight of toll of such passengers, goods and other property as may be received from such other railroads so connected with said road as aforesaid shall not exceed the general rates of freight and toll on said railroad received for freight and passengers at any of the deposits of said corporation.

SECT. 7. If said railroad in the course thereof shall cross any private way, the said corporation shall so construct said railroad as not to obstruct the safe and convenient use of such private way; and if said railroad shall in the course thereof cross any canal, railroad, or other highway, the said railroad shall be so constructed as not to obstruct the safe and convenient use of such canal or highway, and the said corporation shall have power to raise or lower such highway or private way, so that the said railroad if necessary may conveniently pass over or under the same, and erect such gate or gates thereon as may be necessary for the safety of travelers on said railroad, highway, or private way, and shall keep all bridges and embankments necessary for the same in good repair.

SECT. 8. Said railroad corporation shall erect and maintain substantial, legal, and sufficient fences on each side of the land taken by them for their railroad, where the same passes through enclosed or improved lands, or lands that may be hereafter improved.

SECT. 9. The said corporation shall at all times when the postmaster general shall require it, be holden to transport the mail of the United States, from and to such place or places on said road as may be required for a fair and reasonable compensation. And in case the corporation and the postmaster general shall be unable to agree upon the compensation aforesaid, the legislature of the state shall determine the same. And said corporation after they shall commence the receiving of tolls, shall be bound at all times to have said railroad in good repair, and sufficient number of suitable engines, carriages and vehicles for transportation of persons and articles, and be obliged to receive at all proper times and places and convey the same when appropriate tolls therefor shall be paid or tendered; and a lien is hereby created on all articles transported for said tolls. And said corporation fulfilling on its part all and singular, the several obligations and duties by this section imposed

and enjoined upon it, shall not be held or bound to allow any engine, locomotive, cars, carriages or other vehicles for the transportation of persons or merchandise to pass over said railroad, other than its own furnished and provided for that purpose as herein enjoined and required; provided, however, that said corporation shall be under obligations to transport over said road the passenger and other cars of any other incorporated company that may hereafter construct a railroad connecting with that hereby authorized, such other company being subject to all the provisions of the fifth and sixth sections of this act as to rates of toll and other particulars enumerated in said sections.

SECT. 10. If any person shall wilfully and maliciously or wantonly and contrary to law obstruct the passage of any carriages on said railroad, or in any way spoil, injure or destroy said railroad or any part thereof or anything belonging thereto or any materials or implements to be employed in the construction of or for the use of said railroad, he, she, or they, or any person or persons assisting, aiding or abetting such trespass shall forfeit and pay to said corporation for every such offence treble such damages as shall be proved before the justice court or jury, before whom the trial shall be had to be sued for before any justice or in any court proper to try the same by the treasurer of the corporation or other officer whom they may direct to the use of said corporation. And such offender or offenders shall be liable to indictment by the grand jury of the county within which trespass shall have been committed for any offence or offences contrary to the above provisions; and upon conviction thereof before any court competent to try the same shall pay a fine not exceeding five hundred dollars to the use of the state or may be imprisoned for a term not exceeding five years at the discretion of the court before whom such conviction may be had.

SECT. 11. Said corporation shall keep in a book for that purpose a regular account of all their disbursements, expenditures and receipts, and the books of said corporation shall at all times be open to the inspection of the governor and council, and of any committee duly authorized by the legislature, and at the expiration of every year the treasurer of said corporation shall make an exhibit under oath to the legislature of the profits derived from the income of said railroad.

SECT. 12. All real estate purchased by said corporation for the use of the same under the fourth section of this act shall be taxable to said corporation by the several cities, towns and plantations in which said land lies in the same manner as lands owned by private persons and shall in the valuation list be estimated the same as other adjacent lands of the same quality in such city, town or plantation and not otherwise, and the shares owned by the respective stockholders shall be deemed personal estate and be taxable as such to the owners thereof in the places where they reside and have their homes. And whenever the net income of said corporation shall have amounted to ten per cent. per annum upon the cost of the road and its appendages and incidental expenses, the directors

shall make a special report of the fact to the legislature, from and after which time one moiety or such other portion as the legislature may from time to time determine of the net income of said railroad accruing thereafter over and above ten per cent. per annum first to be paid to the stockholders shall annually be paid over to the treasurer of said corporation as a tax in the treasury of the state for the use of the state; and the state may have and maintain an action against said corporation therefor to recover the same; but no other tax than herein is provided shall ever be levied or assessed on said corporation or any of their privileges or franchises.

SECT. 13. The annual meeting of the members of said corporation shall be holden on the first Monday in January, or such other day as shall be determined by the by-laws at such time and place as the directors for the time being shall appoint, at which meeting the directors shall be chosen by ballot, each proprietor by himself or proxy being entitled to as many votes as he holds shares, and the directors are hereby authorized to call special meetings of the stockholders whenever they shall deem it expedient and proper, giving such notice as the corporation by their by laws shall direct.

SECT. 14. If the said corporation shall not have been organized and the location according to actual survey of the route filed with the county commissioners of the counties through which the same shall pass on or before the first day of January, in the year of our Lord one thousand eight hundred and sixty-five, or if the said corporation shall fail to complete said railroad to Anson on or before the first day of January, in the year of our Lord one thousand eight hundred and sixty-nine, in either of the above mentioned cases this act shall be null and void.

REVISED STATUTES, CHAPTER 51.—1871.

SECT. 47. When a railroad corporation mortgages its franchise for the payment of its bonds or coupons, and trustees are appointed by it, or by special laws, or by the mortgage, the bondholders at a regular meeting called for that purpose and notified as hereinafter provided, may, from time to time, elect, by ballot, new trustees to fill vacancies, or take the place of others holding the trust; but no trustee shall be thus removed until he is paid for all that is due him, and secured against all liabilities assumed by him as said trustee. Any party interested may present the proceedings of such meeting to the Supreme Judicial Court, or to a justice thereof in vacation, who shall appoint a time of hearing, and order such notice to parties interested as he deems proper, and may affirm such elections, and make and enforce any decrees necessary for the transfer of the trust property to the new trustees. All such decrees shall be filed with the clerk of the court where the hearing is had, and recorded by him.

SECT. 48. The neglect of the corporation to pay any overdue bonds or coupons secured by such mortgage, for ninety days after presentment and demand on the treasurer or president thereof, shall be a breach of the conditions of the mortgage; and thereupon the trustees shall call a meeting of the bondholders, by publishing the time and place thereof three weeks successively in the state paper, and in some paper in the county where the road lies, the last publication to be one week at least before the time of the meeting.

SECT. 49. At such meeting and all others, each bondholder present may have one vote for each hundred dollars of bonds held by him or represented by proxy; and they may organize by the choice of a moderator and clerk, and determine whether the trustees shall take possession of such road, and manage and run it in their behalf.

SECT. 50. If they so determine, the trustees shall take possession of such road and all other property covered by the mortgage, and have all the rights and powers, and be subject to all the obligations of the directors and corporation of such road, and may also prosecute and defend suits in their own name as trustees.

SECT. 51. They shall keep an accurate account of all receipts, and expenditures of such road and exhibit it, on request, to any officer of the corporation, or other person interested. They shall from the receipts keep the road. buildings and equipments in repair; furnish such new rolling stock as is necessary, and the balance, after paying the running expenses, shall be applied according to the rights of parties under the mortgage, and to the payment of any damages arising from malfeasance in the management of the road. They shall not be personally liable except for malfeasance or fraud. When all overdue bonds and coupons, secured by the mortgage are paid, they shall surrender the road and other property to the parties entitled thereto.

SECT. 52. They shall annually, and at other times on written request of one-fifth of the bondholders in amount, call a meeting of the bondholders in the manner prescribed in the by-laws of the corporation for calling a meeting of stockholders, and report to them the state of the property, the receipts, expenses and application of the funds. At such meeting, the bondholders may fix the compensation of the trustees; instruct them to contract with the directors of the corporation or other competent party, to operate said road while the trustees have the right of possession, if approved by the bondholders at a regular meeting, otherwise not exceeding two years, and to pay to them the net earnings thereof; or give them any other instruction they deem advisable; and the trustees shall conform thereto, unless inconsistent with the terms of the trust.

SECT. 53. The trustees on application of one-third of the bondholders in amount to have such mortgage foreclosed, shall immediately give notice thereof, by publishing it three weeks successively in the state paper and some paper, if any, in each county in which the road extends, therein stating the date and conditions of the

mortgage, the claims of the applicants under it, that the conditions thereof have been broken, and that for that reason they claim a foreclosure; and they shall cause a copy of such notice and the name and date of each newspaper containing it, to be recorded in the registry of deeds in each such county, within sixty days from the first publication; and unless, within three years from the first publication, the mortgage is redeemed by the mortgagers or those claimant under them, or a bill in equity as in cases of the redemption of mortgaged lands is commenced, founded on payment or a legal tender of the amount of overdue bonds and coupons, or containing an averment that the complainants are ready and willing to redeem on the rendering of an account, the right of redemption shall be forever foreclosed.

SECT. 54. Each holder of overdue bonds or coupons shall present them to the trustees at least thirty days before the right of redemption expires, to be by them recorded; and such right shall not be lost by the non-payment of any claims not so presented; and the parties having the right to redeem shall have free access to the record of such claims.

SECT. 55. The foreclosure of the mortgage shall enure to the benefit of all holders of bonds, coupons and other claims secured thereby; and they, their successors and assigns are constituted a corporation as of the date of the foreclosure, for all the purposes, with all the rights and powers, duties and obligations of the original corporation by its charter; and the trustees shall convey to such new corporation by deeds all the right, title and interest which they had by the mortgage and the foreclosure thereof, and thereupon they shall be discharged. If they neglect or refuse so to convey, the court, on application in equity, may compel them so to do.

SECT. 56. The new corporation may call its first meeting in the manner provided for calling the first meeting of the original corporation and use therefor the old name; but at that meeting, may adopt a new one, by which it shall always after be known; and it may take and hold the possession, and have the use of the mortgaged property, though a bill in equity to redeem is pending, and may become a party defendant to such bill.

SECT. 57. If any part of such property or franchise is subject to a prior mortgage, such new corporation, at a legal meeting called for that purpose, may vote to redeem the same, and make an assessment therefor on all persons holding any stock, certificates for fractions of stock, bonds or coupons in such corporation in proportion to their accounts. The directors shall immediately assess such sum, and fix a time and place for the payment thereof to the treasurer, who shall publish notice accordingly six weeks successively in some newspaper, if any, in each of the counties where the road extends, the last publication to be two weeks at least before the time fixed for payment.

SECT. 58. If any person fails to pay his assessment within the time fixed, the treasurer shall sell enough of his stock at auction to pay the same, with twelve per cent. interest and the cost of adver-

tising and selling, by first publishing notice of such sale three weeks successively in a newspaper printed in the county where the sale is to be, if any, and if not in an adjoining county. Thereupon the president and treasurer shall issue a new certificate of stock to the purchaser; and the delinquent stockholder shall surrender his to be cancelled, and may have a new one for his unsold shares by paying the legal stamp; and if he held bonds, coupons or certificates for fractions of stock, he shall not be entitled to commute them or receive any dividends thereon until he has paid his assessment with twelve per cent. interest.

SECT. 59. The directors shall apply the money realized from such assessments solely to the redemption of such prior mortgage until it is fully paid; and then all the property, rights and interests secured thereby shall vest in such new corporation.

SECT. 60. When a subsequent mortgage of a railroad, its franchise or of any part of its other property, contains no provision for a sale, or a conditional provision depending on the application of a majority in amount of the claims secured thereby, and no such application has been made to the trustees, the holder of such mortgage may redeem a prior mortgage on the same property which is under process of foreclosure, at any time before it comes absolute; and hold it in trust for those who contributed thereto in proportion to the amount paid by each.

SECT. 61. For such purpose, the trustees of such subsequent mortgage, on the application of one or more persons interested therein, made six months prior to the absolute foreclosure of such prior mortgage, and on payment of reasonable expenses to be incurred thereby, shall call a meeting of all interested and publish a notice thereof, stating the time, place and purpose, three weeks successively in the state paper and such other papers as they may think proper. If at such meeting, or one called by the trustees without application, the holders of a majority of the interests there represented vote to redeem the prior mortgage, each one may contribute his proportion thereto. The trustees shall give immediate notice of such vote by publishing it as above, and shall therein state the time and place of payment, and the amount to be paid on each hundred dollars as near as may be. If anyone fails to pay his proportion, any other person interested in said subsequent mortgage may pay it, and succeed to all his rights except as hereinafter provided.

SECT. 62. If no such meeting is called or it is voted not to redeem, one or more of the persons interested in such subsequent mortgage, may pay to the trustees thereof the amount required to redeem the prior mortgage; and such trustees shall redeem it accordingly and then hold in trust for the persons so paying.

SECT. 63. When a prior mortgage has been redeemed in either mode aforesaid, and all persons interested in the subsequent mortgage have not paid their proportions thereof, the trustees shall publish a notice ten weeks successively in the state paper, the first pub-

lication not to be till the right of redeeming the prior mortgage would have expired, that delinquents may pay the same to them or their agents with twelve per cent. interest within one year from the first publication of said notice; and any person so paying shall have the same rights as if he had paid originally; and those not so paying are barred. Money so paid shall be divided ratably to those who advanced the redemption money; and they may become a new corporation, and new certificates of stock or fractions of stock may be issued in the manner and with the rights, powers and obligations hereinbefore provided.

SECT. 64 When a prior mortgage is thus redeemed, any number of the stockholders of the old corporation may redeem it within two years thereafter by paying to the trustees of such subsequent mortgage the amount paid therefor, with ten per cent. interest, and also the amount secured by the subsequent mortgage due to those who had contributed to redeem the prior mortgage, after deducting the net earnings of said road or adding the net deficiencies, if operated by the trustees of the subsequent mortgage; and said stockholders may demand of said trustees an accurate account of the receipts and expenditures and amount due, on the mortgage, and have the same remedies for a failure as in case of mortgages of real estate. After such redemption the redeeming stockholders shall have all the rights of those from whom they redeemed.

SECT. 65. The stockholders redeeming as aforesaid, shall give notice to the stockholders who have not contributed thereto; and the latter shall have the same rights hereinbefore provided in the case of bondholders.

SECT. 66. The persons interested in a prior mortgage on which a foreclosure is commenced, at a meeting called for the purpose, may extend the time of redemption; and thereupon the trustees of such mortgage, by a suitable writing, delivered to the party entitled to redeem, shall extend the time accordingly.

SECT. 67. When the franchise of a railroad and its road, wholly or partly constructed, are sold by a decree of the Court, by a power of sale in a mortgage thereof or on execution, the purchasers have all the rights, powers and obligations of the corporation under its charter, and may form a new corporation in the manner hereinbefore provided. If the original corporation or those claiming under it have a right to redeem, they may do so in the manner provided for the redemption of mortgaged real estate; but shall pay in addition to the amount of the sale and interest, the reasonable expenditures made by the new corporation in completing, repairing and equipping said road, and in the purchase of necessary property therefor, after deducting the net earnings thereof.

SECT. 68. The trustees of the bondholders or other parties under contract with them operating a railroad, and all the corporations formed in the modes hereinbefore provided, shall have the

same rights, powers and obligations as the old corporation had by its charter and the general laws; and shall also be subject to be amended, altered or repealed by the legislature and to all the general laws concerning railroads, notwithstanding anything to the contrary in the original charter.

SECT. 69. The original corporation shall exist, after the foreclosure of the mortgage, for the sole purpose of closing up its unsettled business; and the right of action against it or its stockholders shall not thereby be impaired; but in suits founded on any of the bonds or coupons secured by the mortgage, the proportional actual value of the property taken under the mortgage shall be deducted.

SECT. 70. The Supreme Judicial Court, in addition to the jurisdiction specifically conferred upon it by this chapter, may have jurisdiction, as in equity, of all other matters in dispute arising under the preceding sections relating to trustees, mortgages, and the redemption and foreclosure of mortgages; but not to take away any rights or remedies that any party has and may elect to enforce at law; and in all proceedings relating to trustees or to mortgages, their foreclosure and redemption, not otherwise provided for herein, the law relating to trusts and mortgages of real estate may be applied.

CHAPTER 90.—1871.

SECT. 1. Mortgages of real estate, mentioned in this chapter, include those made in the usual form, in which the condition is set forth in the deed, and those made by a conveyance appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time or as part of the same transaction.

SECT. 2. Any mortgagee, or person claiming under him, may enter on the premises, or recover possession thereof before a breach of the condition of the mortgage, when there is no agreement to the contrary; but in such case, if the debt is afterwards paid or the mortgage redeemed the amount of the clear rents and profits, from the time of the entry, shall be accounted for, and deducted from the amount due on the mortgage.

SECT. 3. After breach of the condition, if the mortgagee, or any one claiming under him, desires to obtain possession of the premises for the purpose of foreclosure, he may proceed in either of the following ways, viz:

First. He may commence an action at law and obtain possession under a writ of possession issued on the judgment in the action, as provided in the eighth section duly executed by an officer. An

abstract of such writ, stating the time of obtaining possession, certified by the clerk, shall be recorded in the registry of deeds of the district in which the estate is, within thirty days after possession obtained.

Second. He may enter possession, and hold the same by consent in writing of the mortgagor, or the person holding under him.

Third. He may enter peaceably and openly, if not opposed, in the presence of two witnesses and take possession of the premises; and a certificate of the fact and time of such entry shall be made, signed and sworn to by such witnesses before a justice of the peace; and such written consent and certificate shall be recorded in each registry of deeds in which the mortgage is or by law ought to be recorded, within thirty days next after the entry is made.

SECT. 4. Possession obtained in either of these three modes, and continued for the three following years, shall forever foreclose right of redemption.

SECT. 5. If after breach of the condition, the mortgagee, or any person claiming under him, is not desirous of taking and holding possession of the premises, he may proceed for the purpose of foreclosure in either of the following modes:

First. He may give public notice in a newspaper printed in the county where the premises are situated, if any, or if not, in the state paper, three weeks successively, of his claim by mortgage on such real estate, describing the premises intelligibly, and naming the date of the mortgage, and that the condition in it is broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper in which it was last published, to be recorded in each registry of deeds in which the mortgage deed is or by law ought to be recorded, within thirty days after such last publication.

Second. He may cause an attested copy of such notice to be served on the mortgager or his assignee, if he lives in this state, by the sheriff or his deputy of the same county, by delivering it to him in hand or leaving it at his place of last and usual abode; and cause the original notice and the sheriff's return thereon to be recorded within thirty days after such service as aforesaid; and in all cases the certificate of the register of deeds shall be *prima facia* evidence of the fact of such entry, notice, publication of foreclosure, and of the sheriff's return.

SECT. 6. The mortgager, or person claiming under him, may redeem the mortgaged premises within three years next after the first publication, or the service of the notice mentioned in the preceding section, and if not so redeemed his right of redemption shall be forever foreclosed.

SECT. 7. The mortgagee, or person claiming under him, in an action for possession, may declare on his own seizin, in a writ of

entry, without naming the mortgage or assignment; and if it appears on default, demurrer, verdict or otherwise, that the plaintiff is entitled to the possession of the premises for the breach of the condition of the mortgage, the court shall, on the motion of either party, award the conditional judgment hereinafter mentioned, unless it appears that the tenant is not the mortgager, or a person claiming under him, and in that case, judgment may be entered as at common law, unless the plaintiff consents to the entry of a conditional judgment.

SECT. 8. The conditional judgment shall be that, if the mortgager, his heirs, executor or administrator, pay the sum the court adjudges to be due and payable, with interest, within two months from the time of judgment, and shall also pay such other sums as the court adjudges to be thereafter payable, within two months from the time they fall due, no writ of possession shall issue and the mortgage shall be void; otherwise it shall issue in due form of law, upon the first failure to pay according to said judgment. When the condition is for doing some other act than the payment of money, the court may vary the conditional judgment as the circumstances require; and the writ of possession shall issue, if the terms of the conditional judgment are not complied with within the two months.

SECT. 9. If it appears that nothing is due on the mortgage, judgment shall be rendered for the defendant and for his costs, and he shall hold the land discharged of the mortgage.

SECT. 10. When a mortgagee, or person claiming under him, is dead, the same proceedings to foreclose the mortgage may be had by his executor or administrator, declaring on the seizin of the deceased, as he might have had if living.

SECT. 11. Lands mortgaged to secure the payment of debts, or the performance of any collateral engagement, and the debts so secured, on the decease of the mortgagee, or person claiming under him, shall be assets in the hands of his executors or administrators; and they shall have the control of them as of a personal pledge; and when they recover seizin and possession thereof, it shall be to the use of the widow and heirs, or devisees, or creditors of the deceased, as the case may be; and when redeemed, they may receive the money, and give effectual discharges therefor, and releases of the mortgaged premises.

SECT. 12. An action on a mortgage deed may be brought against a person in possession of the mortgaged premises; and the mortgager, or person claiming under him, may, in all cases, be joined with him as a cotenant, whether he then has any interest or not in the premises; but he shall not be liable for costs, when he has no such interest, and makes his disclaimer thereto upon the records of the court.

SECT. 13. Any mortgager, or other person having a right to redeem lands mortgaged, may demand of the mortgagee or person claiming under him a true account of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any; and if he unreasonably refuses or neglects to render such account in writing, or, in any other way by his default prevents the plaintiff from performing or tendering performance of the condition of the mortgage, he may bring his bill in equity for the redemption of the mortgaged premises within the time limited in section six, and therein offer to pay the sum found to be equitably due, or to perform any other condition, as the case may require; and such offer shall have the same force as a tender of payment or performance before the commencement of the suit; and the bill shall be sustained without such tender, and thereupon he shall be entitled to judgment for redemption and costs.

CHAPTER 104.—1871.

SECT. 1. Any estate of freehold, in fee simple, fee tail, for life, or any term of years, may be recovered by a writ of entry; and such writs, and the writ in action of dower, shall be served by attachment and summons, or copy of the writ, on the defendant, but if he is not in possession, the officer shall give the tenant in hand, or leave at his place of last and usual abode, an attested copy of the writ; and if the defendant is not an inhabitant of this state, the service on the tenant shall be sufficient notice to the defendant, or the court may order further notice.

SECT. 2. The defendant shall declare on his own seizin within twenty years then last past, without naming any particular day, or averring a taking of the profits, and allege a disseizin by the tenant.

SECT. 3. He shall set forth the estate he claims in the premises, whether in fee simple, fee tail, for life or for years; and if for life, then whether for his own life or that of another; but need not state in the writ the origin of his title, or the deduction of it to himself; but, on application of the tenant, the court may direct the demandant to file an informal statement of his title, and its origin.

SECT. 4. He need not prove an actual entry under his title; but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein, shall be sufficient proof of his seizin.

SECT. 5. No such action shall be maintained, unless, at the time of commencing it, the defendant had such right of entry; and no descent or discontinuance shall defeat any right of entry for the recovery of real estate.

SECT. 6. Every person alleged to be in possession of the premises demanded in such writ, claiming any freehold therein, may be considered a disseizor for the purpose of trying the right; but the defendant may plead in abatement, but not in bar, that he is not tenant of the freehold or by a brief statement under the general issue, filed within the time allowed for pleas in abatement, unless by leave of court the time therefor is enlarged; and he may show that he was not in possession of the premises when the action was commenced, and disclaim any right, title or interest therein, and proof of such fact shall defeat the action; and if he claimed, or was in possession of only a part of the premises when the action was commenced, he shall describe such part in a statement, signed by him or his attorney and filed in the case, and may disclaim the residue; and if the facts contained in such statement are proved on trial, the demandant shall recover judgment for no more than such part.

SECT. 7. If the person in possession has actually ousted the demandant, or withheld the possession, he may, at the demandant's election be considered a disseizor for the purpose of trying the right, though he claims an estate therein less than a freehold.

SECT. 8. In the trial upon such writ, on the general issue, if the demandant proves that he is entitled to such estate in the premises as he has alleged, and had a right of entry therein when he commenced his action, he shall recover the premises, unless the tenant proves a better title in himself.

SECT. 9. Persons claiming as tenants in common, joint tenants, or co-partners, may all, or any two or more, join in a suit for recovery of lands; or one may sue alone.

SECT. 10. The demandant may recover a specific part or undivided portion of the premises to which he proves a title, though less than he demanded.

SECT. 11. When a demandant recovers judgment in a writ of entry he may therein recover damages for the rents and profits of the premises from the time his title accrued, subject to the limitation herein contained; and for any destruction or waste of the buildings or other property, for which the tenant is by law answerable.

SECT. 12. The rents and profits, for which the tenant is liable, is the clear annual value of the premises while he was in possession, after deducting all lawful taxes paid by him, and the necessary and ordinary expenses of repairs, cultivating the land, or collecting the rents and profits.

SECT. 13. In estimating the rents and profits, the value of the use by the tenant of improvements made by himself, or those under whom he claims, shall not be allowed to the demandant.

SECT. 14. The tenant shall not be liable for the rents and profits for more than six years, nor for waste or other damage committed before that time, unless the rents and profits are allowed in set-off to his claim for improvements.

CHAPTER 622.

AN ACT authorizing certain towns to raise money to aid in the construction of the Somerset Railroad, or Somerset and Kennebec Railroad.

Be it enacted by the Senate and House of Representives in Legislature assembled, as follows:

SECT. 1. The towns of Anson, Bingham, Embden, New Portland, Norridgewock, Solon and Starks, may severally, at any legal meeting duly notified and held for that purpose, raise by tax or loan such sums of money as they shall severally deem expedient, not exceeding one hundred thousand dollars by the town of Anson, forty thousand dollars by the town of Bingham, forty thousand dollars by the town of Embden, sixty thousand dollars by the town of New Portland, eighty thousand dollars by the town of Norridgewock, sixty thousand dollars by the town of Solon, and forty thousand dollars by the town of Starks, and may appropriate the same to aid in the construction of the Somerset Railroad, or extending the Somerset and Kennebec Railroad, in such manner as they shall deem proper; provided that two-thirds of the legal voters present and voting at such meetings shall vote therefor.

SECT. 2. The towns named in the first section of this act may severally make such contracts with the Somerset Railroad Company for the purpose mentioned in the preceding section as they may think necessary, and may raise money by tax or loan to carry the same into effect, not exceeding the amount stated in the preceding section.

SECT. 3. The said towns shall severally raise in each year commencing the third year after a loan shall be effected, should the money be raised by a loan, a sum not less than three per cent. of the amount of such loan, to be applied to the liquidation of the principal of such loan in addition to the interest, unless the same shall be satisfactorily provided for in some other way.

SECT. 4. The selectmen of the several towns named in this act are authorized to vote upon the stock held by said towns at all meetings of said railroad corporation, or appoint an agent for that purpose, by writing, under their hands.

SEC. 5. This act shall take effect when approved.

Approved March 6, 1868.

CHAPTER 53.—1878.

AN ACT in addition to chapter fifty-one of the Revised Statutes, relating to mortgages of corporations.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

SECT. 1. The provisions of sections forty-seven to seventy, each inclusive, of chapter fifty-one of the Revised Statutes, and all acts explanatory or amendatory thereof or additional thereto, shall apply to and include all mortgages of franchises, lands, property and rights of property of any kind whatever, whether heretofore given or hereafter to be given by any corporation to trustees, to secure the payment of scrip or bonds of said corporation, in all cases in which the principal of said scrip or bonds shall have been due and payable for more than three years, and shall remain unpaid in whole or in part, in the same way and to the same extent as if the mortgage had been legally foreclosed, subject to all rights of redemption, as provided in section fifty-seven of said chapter fifty-one; and the holders of said scrip or bonds shall have the benefit of all said provisions and acts, and shall have all the rights and powers of the corporation under its charter, and may form a new corporation in the manner provided in said chapter fifty-one and the acts amendatory thereof and additional thereto, whenever the holders of such scrip or bonds to any amount exceeding one-half of the same shall so elect, in writing.

SECT. 2. The capital stock of such new corporation shall be equal to the amount of unpaid bonds and coupons secured by such mortgage, taken at their face at the time of the organization of the new corporation, and the amount required to redeem any prior mortgage, and shall be divided into shares of one hundred dollars each. All stock issued under the provisions of this act shall be taken and considered as paid for in full, and shall not be liable to further assessment; and no person, taking or holding the same, shall by reason thereof be liable for the debts of such corporation.

Approved February 19, 1878.

CHAPTER 90.—1883.— R. S.

SEC. 1. Mortgages of real estate, mentioned in this chapter, include those made in the usual form, in which the condition is set forth in deed, and those made by a conveyance appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time or as part of the same transaction.

SEC. 2. A mortgagee, or person claiming under him, may enter on the premises, or recover possession thereof, before or after breach of condition, when there is no agreement to the contrary; but in such case, if the mortgage is afterwards redeemed, the amount of the clear rents and profits from time of taking possession, shall be accounted for and deducted from the sum due on the mortgage.

SEC. 3. After breach of the condition, if the mortgagee, or any one claiming under him, desires to obtain possession of the premises for the purpose of foreclosure, he may proceed in either of the following ways, viz:

I. He may obtain possession under a writ of possession issued on a conditional judgment, as provided in section nine, duly executed by an officer. An abstract of such writ, stating the time of obtaining possession, certified by the clerk, shall be recorded in the registry of deeds of the district in which the estate is, within thirty days after possession has been obtained.

II. He may enter into possession and hold the same by consent in writing of the mortgagor, or the person holding under him.

III. He may enter peaceably and openly, if not opposed, in the presence of two witnesses, and take possession of the premises; and a certificate of the fact and time of such entry shall be made, signed and sworn to by such witnesses before a justice of the peace; and such certificate, or consent, with the affidavit of the mortgagee or his assignee to the fact and time of entry indorsed thereon, shall be recorded in each registry of deeds in which the mortgage is or by law ought to be recorded, within thirty days after the entry is made.

SEC. 4. Possession obtained in either of these three modes, and continued for the three following years, forever forecloses the right of redemption.

SEC. 5. If after breach of the condition, the mortgagee, or any person claiming under him, is not desirous of taking and holding possession of the premises, he may proceed for the purpose of foreclosure in either of the following modes:

I. He may give public notice in a newspaper printed in the county where the premises are situated, if any, or if not, in the

state paper, three weeks successively, of his claim by mortgage on such real estate, describing the premises intelligibly, and naming the date of the mortgage, and that the condition in it is broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper in which it was last published, to be recorded in each registry in which the mortgage deed is or by law ought to be recorded, within thirty days after such last publication.

II. He may cause an attested copy of such notice to be served on the mortgagor or his assignee, if he lives in the state, by the sheriff of the same county or his deputy, by delivering it to him in hand or leaving it at his place of last and usual abode; and cause the original notice and the sheriff's return thereon to be recorded within thirty days after such service as aforesaid; and in all cases the certificate of the register of deeds if *prima facie* evidence of the fact of such entry, notice, publication of foreclosure, and of the sheriff's return.

SEC. 6. The mortgagor, or person claiming under him, may redeem the mortgaged premises within three years after the first publication, or the service of the notice mentioned in the preceding section, and if not so redeemed his right of redemption is forever foreclosed; provided, that the mortgagor and mortgagee may agree upon a shorter time, not less than one year, in which the mortgage shall be forever foreclosed, which agreement shall be inserted in the mortgage and be binding on the parties, their heirs and assigns, and shall apply to all the modes prescribed for the foreclosure of mortgages on real estate.

SEC. 7. Whenever a mortgagee or his assignee dies, and there is no executor or administrator to receive the mortgage money, the mortgagor or person claiming under him having a right to redeem, may apply to the judge of probate of the county where the estate mortgaged is situated, for the appointment of an administrator upon such estate, and if, after due notice to all parties interested therein, they neglect or refuse to take out administration for thirty days, then the judge may commit administration to such person as he deems suitable, who may act as adminstrator with reference to said mortgage, as provided by law.

In all such cases, however, personal notice shall first be given to the widow and heirs of the deceased known to be living in the state, either by service on them in person or by leaving such notice at their last and usual place of abode.

SEC. 8. The mortgagee, or person claiming under him, in an action for possession, may declare on his own seizin, in a writ of entry without naming the mortgage or assignment; and if it appears on default, demurrer, verdict or otherwise, that the plaintiff is entitled to possession, and that the condition had been broken when the action was commenced, the court shall, on motion of

either party, award the conditional judgment, unless it appear, that the tenant is not the mortgagor or a person claiming under him, or that the owner of the mortgage proceeded for foreclosure conformably to sections five and six before the suit was commenced, the plaintiff not consenting to such judgment, and unless such judgment is awarded, judgment shall be entered as at common law.

SEC. 9. The conditional judgment shall be, that if the mortgagor, his heirs, executor or administrator, pay the sum that the court adjudges to be due and payable, with interest, within two months from the time of judgment, and also pays such other sums as the court adjudges to be thereafter payable, within two months from the time that they fall due, no writ of possession shall issue and the mortgage shall be void; otherwise it shall issue in due form of law, upon the first failure to pay according to said judgment. And if, after three years from the rendition of the judgment, the writ of possession has not been served or the judgment wholly satisfied, another conditional judgment may, on *scire facias* sued out in the name of the mortgagee or assignee, be rendered, and a writ of possession issued as before provided. When the condition is for doing some other act than the payment of money, the court may vary the conditional judgment as the circumstances require; and the writ of possession shall issue, if the terms of the conditional judgment are not complied with within the two months.

SEC. 10. If it appears that nothing is due on the mortgage, judgment shall be rendered for the defendant and for his costs, and he shall hold the land discharged of the mortgage.

SEC. 11. When a mortgagee, or person claiming under him, is dead, the same proceedings to foreclose the mortgage may be had by his executor or administrator, declaring on the seizin of the deceased, as he might have had if living.

SEC. 12. Lands mortgaged to secure the payment of debts, or the performance of any collateral engagement, and the debts so secured, are on the death of the mortgagee, or person claiming under him, assets in the hands of his executors or administrators; they shall have the control of them as of a personal pledge; and when they recover seizin and possession thereof, it shall be for the widow and heirs, or devisees, or creditors of the deceased, as the case may be; and when redeemed, they may receive the money, and give effectual discharges therefor, and releases of the mortgaged premises.

SEC. 13. An action on a mortgage deed may be brought against a person in possession of the mortgaged premises; and the mortgagor, or person claiming under him, may, in all cases, be joined with him as a co-tenant, whether he then has any interest or not in the premises; but he is not liable for costs, when he has no such interest, and makes his disclaimer thereto upon the records of the Court.

SEC. 14. Any mortgagor, or other person having a right to redeem lands mortgaged, may demand of the mortgagee or person claiming under him a true account of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any; and if he unreasonably refuses or neglects to render such statement in writing, or, in any other way, by his default prevents the plaintiff from performing or tendering performance of the condition of the mortgage, he may bring his bill in equity for the redemption of the mortgaged premises within the time limited in section six, and therein offer to pay the sum found to be equitably due, or to perform any other condition as the case may require; and such offer has the same force as a tender payment or performance before the commencement of the suit; and the bill shall be sustained without such tender, and thereupon he shall be entitled to judgment for redemption and costs.

CHAPTER 104.—R. S.—1883.

SEC. 1. Any estate of freehold, in fee simple, fee tail, for life, or any term of years, may be recovered by a writ of entry; and such writs, and the writ in an action of dower, shall be served by attachment and summons, or copy of the writ, on the defendant, but if he is not in possession, the officer shall give the tenant in hand, or leave at his place of last and usual abode, an attested copy of the writ; and if the defendant is not an inhabitant of the state, the service on the tenant shall be sufficient notice to the defendant, or the court may order further notice.

SEC. 2. The demandant shall declare on his own seizin within twenty years then last past, without naming any particular day or averring a taking of the profits, and shall allege a disseizin by the tenant.

SEC. 3. He shall set forth the estate which he claims in the premises, whether in fee simple, fee tail, for life or for years; and if for life, then whether for his own life, or that of another; but he need not state in the writ the origin of his title, or the deduction of it to himself; but, on application, of the tenant, the court may direct the demandant to file an informal statement of his title, and its origin.

SEC. 4. He need not prove an actual entry under his title; but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein, is sufficient proof of his seizin.

SEC. 5. No such action shall be maintained, unless, at the time of commencing it, the demandant had such right of entry; and no

descent or discontinuance shall defeat any right of entry for the recovery of real estate.

SEC. 6. Every person alleged to be in possession of the premises demanded in such writ claiming any freehold therein, may be considered a disseizor for the purpose of trying the right; but the defendant may plead in abatement, but not in bar, that he is not tenant of the freehold or he may plead it by a brief statement under the general issue, filed within the time allowed for pleas in abatement, unless by leave of court the time therefor is enlarged; and he may show that he is not in possession of the premises when the action was commenced, and disclaim any right, title, or interest therein, and proof of such fact shall defeat the action; and if he claimed or was in possession of only a part of the premises when the action was commenced, he shall describe such part in a statement, signed by him or his attorney and filed in the case, and may disclaim the residue; and if the facts contained in such statement are proved on trial, the demandant shall recover judgment for no more than such part.

SEC. 7. If the person in possession has actually ousted the demandant or witheld the possession, he may at the demandant's election, be considered a disseizor for the purpose of trying the right, although he claims an estate therein less than a freehold.

SEC. 8. In the trial upon such writ, on the general issue, if the demandant proves that he is entitled to such estate in the premises as he has alleged, and had a right of entry therein when he commenced his action, he shall recover the premises, unless the tenant proves a better title in himself.

SEC. 9. Persons claiming as tenants in common, joint tenants, or co-partners, may all, or any two or more, join in a suit for recovery of lands, or one may sue alone.

SEC. 10. The demandant may recover a specific part or undivided portion of the premises to which he proves a title, although less than he demanded.

SEC. 11. When a demandant recovers judgment in a writ of entry, he may therein recover damages for the rents and profits of the premises, for the time when his title accrued, subject to the limitation herein contained; and for any destruction or waste of the buildings or other property, for which the tenant is by law answerable.

SEC. 12. The rents and profits, for which the tenant is liable, are the clear annual value of the premises while he was in possession, after deducting all lawful taxes paid by him, and the necessary and ordinary expenses of repairs, cultivation of the land, or collection of the rents and profits.

SEC. 13. In estimating the rents and profits, the value of the

use by the tenant of improvements made by himself or by those under whom he claims, shall not be allowed to the demandant.

SEC. 14. The tenant is not liable for the rents and profits for more than six years, nor for waste or other damage committed before that time, unless the rents and profits are allowed in set-off to his claim for improvements.

CHAPTER 103—1887.

AN ACT to amend section one hundred and nine of chapter fifty-one of the Revised Statutes, relating to railroads.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

SECT. L. Section one hundred and nine of chapter fifty-one of the revised statutes, is hereby amended by adding thereto the following: "And any subsequent foreclosure, in any method provided by law, of the mortgage given to secure such bonds or scrip, shall insure at once for the benefit of such corporation, and vest therein the title acquired by such foreclosure," so that said section as amended, shall read as follows:

SECT. 109. Sections eighty-five to one hundred and eight, each inclusive, apply to and include all mortgages of franchises, lands, property hereditaments and rights of property of every kind whatever, whether heretofore given or hereafter to be given by any corporation to trustees, to secure the payment of scrip or bonds of said corporation, in all cases in which the principal of said scrip or bonds has been due and payable for more than three years, and remains unpaid in whole or in part, or on which no interest has been paid for more than three years, in the same way and to the same extent as if the mortgage has been legally foreclosed, subject to all rights of redemption, as provided in section ninety-five; and the holders of said scrip or bonds shall have the benefit of said sections, and all the rights and powers of the corporation under its charter, and may form a new corporation in the manner provided in this chapter, whenever the holders of such scrip or bonds to an amount exceeding one-half of the same so elect, in writing. And any subsequent foreclosure, in any method provided by law, of the mortgage given to secure such bonds or scrip, shall inure at once for the benefit of such corporation, and vest therein the title acquired by such foreclosure.

SECT. 2. This act shall take effect when approved.

Approved March 11, 1887.

CHAPTER 166.

AN ACT amendatory of and additional to chapter fifty-one of the Revised Statutes, in relation to railroads.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

SEC. 1. Section sixty-seven of chapter fifty-one of the revised statutes, is hereby amended by inserting after the word "road" in the first line thereof, the words, "or right of redeeming the franchise of a railroad, and its road from a mortgage thereof," so that the first clause of said section shall read as follows:

'SEC. 67. When the franchise of a railroad and its road, or the right of redeeming the franchise of a railroad and its road from a mortgage thereof, wholly or partly constructed, are sold by a decree of court, by a power of sale in a mortgage thereof, or on execution, the purchasers have all the rights, powers and obligations of the corporation, under its charter, and may form a new corporation in the manner hereinbefore provided.'

SEC. 2. Any corporation, formed under the provisions of chapter fifty-one of the revised statutes, and acts additional thereto, by the holders of railroad bonds, are empowered to acquire by purchase the right of redemption, under the mortgage securing such bonds.

SEC. 3. The provisions of chapter fifty-three of the laws of eighteen hundred and seventy-eight, shall apply to cases in which no interest has been paid for more than three years, as well as to cases in which the principal has been overdue for more than three years, as therein provided.

SEC. 4. Whenever the principal of any scrip or bonds issued by a railroad corporation shall have been due and payable for more than three years, or no interest has been paid thereon for more than three years, a corporation formed by the holders of such scrip or bonds, or if no such corporation has been formed, the holders of not less than a majority of such scrip or bonds, may commence a suit in equity for the purpose of foreclosing such mortgage; and the court may decree a foreclosure of such mortgage, unless the arrears are paid within such time as the court may order.

SEC. 5. This act shall take effect when approved.

Approved March 6, 1883.